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see V. 2455

No. 11483

IN THE

10. 2455-6

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LARRY FINLEY and MIRIAM FINLEY,

Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation, H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation, H. E. BISHOP and LAWRENCE BARNETT,

Appellants,

vs.

LARRY FINLEY and MIRIAM FINLEY,

Appellees,

TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME III

(Pages 657 to 992, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB 24 1947

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(Testimony of Larry Finley)

Mr. Finley, you testified to a telephone conversation with Mr. Hal Howard in the month of February, 1945, where he spoke to you that he had certain bands available?

A. Yes.

Q. Now, that was after your conference with Mr. Joe Ross. You remember you testified you went to see Mr. Joe Ross, the attorney, with your lawyer?

A. That is right.

Q. And then a few days later Mr. Hal Howard telephoned to you, and in my note here, he discussed with you about submitting to you Bob Chester, Jack Teagarden and Ted Fio Rito?

A. That is right.

Q. They were all three name bands?

A. Yes.

Q. And you had a conversation with him?

A. I believe I stated in my testimony I didn't recall—

Q. Just answer my question.

A. —whether Mr. Howard or Mr. Bishop. I would like to correct that. I don't remember who it was that called. There was a telegram at the time and a telephone conversation.

Q. It was either Mr. Bishop or Mr. Howard you talked [730] to?

A. That is right.

Q. And in that, they offered you these three bands?

A. That is right.

Q. And you asked them the prices?

A. That is right.

Q. And you said you would not pay that price?

A. I said that, in addition to other things, Mr. Doherty.

(Testimony of Larry Finley)

Q. First, you refused on the ground of price, did you not, one of the grounds?

A. Well, the first ground I refused on was the fact that the week before they had played the Square, two bands in one evening, and I would only have one for one evening. That was my first basis for refusal.

Q. Were they offering you the bands for the immediate week that they were talking to you, on February the 25th, or whatever the date was?

A. I believe it was a week and a half off. I don't quite recall. I know it was right soon.

Q. Then, you were objecting, first, on the basis that the date they were offering you the band was too close to the previous engagement?

A. There were two objections. One was the date, the fact that the date was too close to an engagement where both [731] bands had appeared at the ballroom together on one night in a so-called "battle of music." The other objection was the fact that the price to me for a two-night engagement was in excess of the price the Pacific Square paid for a three-night engagement.

Q. That is, you wanted to fix the price, didn't you?

A. Yes; I definitely wanted the price fixed, and especially on Fio Rito. I offered to take Fio Rito if I was offered a proportionate price; but I couldn't see paying \$1100.00 a night when the Square paid him \$700.00 a night, or somewhere in that proximity.

Q. And one of your objections was that the price was too high, according to the way you figured it?

A. That is right.

Q. When you hired Tommy Dorsey in New York who fixed the price?

A. Tommy Dorsey.

(Testimony of Larry Finley)

Q. And when you hired Jimmy Dorsey in New York who fixed the price?

A. His manager. I should say that Tommy Dorsey's managed fixed the price.

Q. In each instance they fixed the price?

A. That is correct.

Q. And Tommy Dorsey, your partner, fixed the highest price he had ever been paid for a single engagement, did he [732] not?

A. Well, the price was discussed before we discussed—

Q. No. Answer my question. Didn't you testify here yesterday that Tommy Dorsey said that was the highest price he had ever been paid for an engagement?

The Witness: Will you read the question back to me again, please? I am sorry.

(Pending question read by the reporter.)

The Witness: The previous question to that.

(The last previous question was read by the reporter.)

Mr. Doherty: I am speaking of a dance hall engagement.

A. Yes. The answer is yes, Mr. Doherty.

Q. Now, you remember after this conversation with Hal Howard about the bands that you could have, that you got a letter from him?

A. I honestly don't recall if it was a letter or a telegram, Mr. Doherty.

Q. I will show your counsel a carbon copy of a letter, and after he has examined it I will let you see it.

The Witness: All right.

(Testimony of Larry Finley)

Mr. Doherty: To save time, Mr. Christensen, I made a typewritten copy. You can be looking at the typewritten copy—

Mr. Christensen: Oh, surely.

Mr. Doherty: —while I show the original to Mr. Finley; and in that way we will move along more rapidly. [733]

Mr. Christensen: Well, thank you.

Q. By Mr. Doherty: I will ask you if you remember receiving the original of that letter? [734]

A. Yes, I think I do, Mr. Doherty. I believe I do recall receiving that.

Q. And it was received on or about the date that it bears, February the 27th, 1945, allowing for the usual time of postage from Los Angeles to San Diego?

A. Yes.

Mr. Doherty: May we introduce this, your Honor, as the next defendants' letter in order?

The Court: So ordered.

The Clerk: That is Defendants' Exhibit K.

Mr. Doherty: May I read it to the jury, your Honor?

Dated February 27th, 1945, Defendants' Exhibit K,
Mr. Reporter.

"Mr. Larry Finley

"Mission Beach Ballroom

"San Diego, California

"Dear Larry:

"Confirming our telephone conversation of today whereby you were submitted Bob Chester and His Orchestra for March 16, 17, and 18 at \$2,500.00 against 50%;

(Testimony of Larry Finley)

Jack Teagarden for March 30, 31, and April 1 at \$2,500.00 against 50%; and Ted Fio Rito on March 23, 24, and 25 and-or March 30, 31 and April 1 for \$2,500.00 against 50% each series of three nights. [735]

"These attractions have done well on engagements not only in your territory in the past but throughout the country and have established reputations and prices in line with those which we are quoting.

"During a prior conversation that I had with you you advised you would possibly operate three nights a week. On bands the caliber of those we are discussing, as there are few engagements in this territory to fill up the early week days, the weekend dates must at least cover the operating expense and minimum salary of the organization or, of course, it is to our interest and that of the band's to route them out of the territory, where they could possibly play five or six engagements a week, thus realizing considerably more for their services than if they layed off in order to play your weekend engagement, and that is why there is little difference between a two-day and three-day price.

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Ratcliffe's, however, I understand that this booking has been filled.

"As we are now making plans for the itineraries [736] on these bands, in case you desire to reconsider your refusal, it is important that you communicate with us at once.

"Yours very truly,

"Hal Howard."

(Testimony of Larry Finley)

Q. Now, one of the discussions was between you and Mr. Howard or Mr. Bishop, whichever you recollect having discussed the matter with you; you wanted a two-night operation? A. That is correct.

Q. And he wanted to sell you or assign to you a three-night operation, is that right?

A. Part of it is right, Mr. Doherty. You see, I recall telling him that if I could get some real bands in there, that I would go to a three-night 'week basis; and that is where he got that part, according to our conversation, of probably going to three nights a week.

Q. But you wanted these bands in—

A. On a two-night operation.

Q. —for a two-night operation?

A. That is right.

Q. And you wanted the rate lowered for two nights as compared with what we charged for three nights?

A. That is correct; yes.

Q. And that is another reason that you rejected the [737] offer, was it not? A. That is correct.

Q. Yes. Now, after you received that letter did you answer it?

A. I don't recall if I did or not.

Q. Now, be sure you are accurate on this, as I know you will try to be on all your answers, Mr. Finley.

A. I am trying to answer you.

Q. From the date you got that letter, when did you next ask or suggest the M. C. A. supply you with any band at Mission Beach?

A. One occasion was when Mr. Bishop spoke to me.

(Testimony of Larry Finley)

Q. That was in September and October of 1945?

A. That is right. I don't think I asked them for any bands until September.

Q. Yes.

A. Or, pardon me. It wasn't September.

Q. It was in September?

A. It was not in September. It was in—yes; it was in September. It was around part of September. I thought it was earlier. Around September, yes.

Q. I am only quoting, Mr. Finley, your testimony of this morning. You said September and October, 1945.

A. It was around September; that is right. I didn't ask them for any and they didn't offer me any. [738]

Q. Yes. The fact is, they were talking to you about bands down at the Casino and they asked you, Mr. Bishop, upon one occasion, and also Mr. Barnet on another occasion, how you were getting along at Mission Beach; and you held up your hands and said, "My lawyers won't let me talk to you about it."?

A. That is definitely untrue. It is not so.

Q. You never at any time told anyone that you could not talk about the Mission Beach operation because this lawsuit was pending?

A. That is definitely untrue, I stated.

Q. At no time? A. At no time.

Q. You employed your attorneys to bring this suit, did you not, in the month of February, 1945?

A. No; I think it was in the month of March.

Q. What date in March, keeping in mind the action was filed here on March 20, 1945?

A. I don't recall. I think it was during the first part of March. I don't recall the date, however.

(Testimony of Larry Finley)

Q. Well, you consulted them, did you not, in February?

A. Yes. I went to see Mr. Ross with them in February.

Q. You consulted them around about the 20th of February, didn't you?

A. I don't remember the exact date. That might be so. [739]

Q. Would that be approximately the date?

A. I can't say for sure. It might have been later, Mr. Doherty. I really don't know.

Q. Well, how much later, now, Mr. Finley?

A. I stated that I don't know, Mr. Doherty. It was sometime the latter part of February or the first part of March. I imagine it was just previous to the date of the filing of the action. You say that was March 20th.

Mr. Doherty: We can agree, can we not, Mr. Christensen, that the action was commenced—

The Court: Just look at the file there before you.

Mr. Doherty: —March the 20th, 1945?

Mr. Christensen: I had in mind March 24, 1945. March 20th is correct, sir.

Q. By Mr. Doherty: With that date before you, will you tell us when you first consulted your attorneys respecting bringing this action?

A. I imagine—pardon me. I imagine it was the last part of March, Mr. Doherty. I cannot say for sure, however.

Q. You knew, did you not, Mr. Finley, before you signed the lease with the City of San Diego, that there

(Testimony of Larry Finley)

was some sort of a contract with the Pacific Square, Mr. Dailard, and M. C. A. respecting bands?

A. Before I signed the bid, do you mean, Mr. Doherty?

Q. No; before you signed the lease. [740]

A. Before I signed the lease. Well, I knew there was a deal, but I didn't know just what the substance of it was. In fact, I didn't know that until I saw them attached to the depositions. I didn't know exactly. I knew there was a deal, however.

Q. Why, Mr. Finley, you knew, did you not, before you signed the lease that Mr. Dailard was claiming an exclusive contract?

A. Oh, yes; quite so.

Q. You knew that?

A. Yes; quite so.

Q. And you knew that before you signed the lease with the City of San Diego?

A. That is correct.

Q. And you went ahead and signed the lease without inquiring of Mr. Dailard or the M. C. A. just what the contract was?

A. Well, I was advised by M. C. A. that as long as Dailard had bands at Mission Beach, there was no reason why I couldn't get them from them. That is why I signed the contract.

Q. Mr. Howard told you—

A. And Mr. Barnet told me it would be tough, and he would get something for me.

Q. He said it would be tough? [741]

A. Yes.

Q. Mr. Howard went into your place, I think it was September, 1945, into the Trianon; you testified that he came in there and discussed bands?

Mr. Christensen: 1944, Mr. Doherty.

(Testimony of Larry Finley)

Mr. Doherty: 1944. Mr. Christensen is correct. Thank you.

A. I don't believe it was September, Mr. Doherty.

Q. Was it October?

A. I think it was about November, if I am not mistaken. Yes; I am quite sure it was. If I may think for just a moment?

Q. I am going to help you on it, so I think you—

A. It was the night of October the 30th—November 8th, the Night of November 8th that Mr. Howard was in my ballroom.

Q. No. But you remember, Mr. Finley—and this is not to catch you, but this is to help you, and I am sincere in this—

A. Yes, sir.

Q. Do you remember that you testified that Mr. Howard came into your place at the Trianon and said that he was working for M. C. A., and then he made an appointment with you to see Mr. Barnet in Beverly Hills and you came up?

A. That is not right, Mr. Doherty.

Q. Then, we will go back. I will take your correction. [742] The first time you saw Mr. Howard, then, was the evening of November the 8th in the Trianon?

A. No; that is not right, either.

Q. Well, when did you first see him?

A. I saw Mr. Howard in Los Angeles.

Q. When?

A. It was either the—I don't recall if it was the latter part of September, or I believe it was the first part of October that I saw Mr. Howard in Los Angeles, or in Beverly Hills, I should say.

(Testimony of Larry Finley)

Q. And then he made an appointment for you to see Mr. Barnet?

A. No. I spoke to Mr. Howard on the telephone.

Q. Well, answer my question yes or no. Did Mr. Howard make an appointment with Mr. Barnet to see you?

A. Did Mr. Howard make an appointment with Mr. Barnet? He made an appointment with me to see Mr. Barnet?

Q. Yes. A. Yes; that is right.

Q. And you saw Mr. Barnet and Mr. Howard together? A. That is correct.

Q. And that was before the bids were opened, was it not? A. That is right; yes.

Q. And the bids were opened on October the 30th? [743]

A. October—that is correct.

Q. Then, you saw Mr. Howard before the bids were opened? A. Yes.

Q. And you saw Mr. Howard and Mr. Barnet before the bids were opened?

A. I saw Mr. Howard and Mr. Barnet before the bids were opened. I did not see Mr. Howard alone. I spoke to Mr. Howard on the telephone from San Diego, discussed it with him, and he suggested that I come up and see he and Mr. Barnet, which I did. That was prior to the time that the bids were opened; just how much prior, I don't recall.

Q. And I believe during these various conversations you never met Mr. Jules Stein?

A. The first time I met Mr. Jules Stein was in the lobby of the Beverly Hills Hotel one night.

(Testimony of Larry Finley)

Q. And I believe you said that whatever Mr. Howard may have done or Mr. Barnet or Mr. Ames Bishop, that you believed that Mr. Jules Stein did not know anything about it?

A. I did not say that to Mr. Stein.

Q. No, but you have made that statement, have you not?

The Witness: Will you repeat the statement? I don't know if you are quoting me word for word or not, Mr. Doherty, and I would like to have it repeated, if I may. [744]

(Question read by the reporter.)

A. I didn't say that, Mr. Doherty. I said something similar, but I did not say that. I said something similar but I did not say that.

Q. Was not that the substance of it, Mr. Finley?

A. No. I stated that I didn't think Mr. Stein knew the way I was being pushed around. That is what I said. That is in my deposition taken at Mr. Warne's office.

Q. Respecting your damages in this case, I will direct your attention to this one statement in your deposition, turning to page 189, beginning at line 16. This is the deposition taken upon October 8, 1945, of Larry Finley, in which you were represented by Mr. Rau.

The Witness: Rau.

Q. Rau, R-a-u, and the defendants were represented by Mr. Clore Warne; and I will ask if these were not the questions and answers at that time—189, beginning at line 16:

(Testimony of Larry Finley)

"Q. By Mr. Warne: First, have you estimated that in any fixed number of dollars up to this time?" Now, Mr. Warne previously had been asking about damages.

"A. No; I haven't.

"Q. Did you at the time you brought this lawsuit, did you at that time compute the damages which you had suffered at that time? Answer yes or no.

"A. At that time I had no damages as yet. I could [745] see damages coming."

Q. You so testified?

A. I signed that; yes. [746]

Q. This matter of name bands is really a matter of opinion, is it not, Mr. Finley, as to what is a name band?

A. Yes, it seems to be an opinion of ballroom operators against opinions that bookers have.

Q. I mean, it is a matter of *pinion*, is it not?

A. Yes and no, I would say to that, Mr. Doherty.

Q. I will ask you to look at the deposition, page 82, the same deposition, beginning at line 8. If you will push it over this way, I can read it a little better.

A. I remember that. I know what it is.

Q. The question was, Miss Reporter:

"The question of what is a name band is essentially a matter of opinion—strike that. The question of whether a band is a name band is essentially a matter of opinion, is it not?

"A. You could be right but not—you could be, but you might not be right, Mr. Warne. As far as a definition of a name band is concerned the definition would be a matter of opinion." You so testified?

A. Yes.

(Testimony of Larry Finley)

Q. About putting bands in places like San Diego, Mr. Finley, from your knowledge, isn't it a bad policy to book a band twice in a community of that size, either in the same or adjacent or competing locations, too close together? [747]

A. I am sorry. I don't get your question.

Q. Probably I didn't state it very accurately. Isn't it a bad policy to book too close together, I mean in dates,—

A. Yes.

Q. —the same band in the same location, or in competing locations, in cities the size of San Diego?

A. I wouldn't say that it was, Mr. Doherty, not at all. San Diego is a big city now.

Q. Yes. Then it is perfectly all right to book a band at Pacific Square one week and at Mission Beach the next week?

A. If it is a good enough band to—if it is a big enough name band to warrant attendance at the box office, the answer is yes.

Q. Yes. And you didn't think that Jack Teagarden or Bob Chester was a big enough band to even date a month apart?

A. I stated the reason for not booking Chester and Teagarden, Mr. Doherty. It is the same as in the motion picture business, where you see a double feature picture at one theatre one week and then have to pay the same admission to set just one of those pictures at a later time. There were two bands at Pacific Square on one week-end, Bob Chester and Jack Teagarden, alternating on the bandstand, and I couldn't see booking them a month later when the talk around [748] town of the kids was that the music was bad. I couldn't see booking them into

(Testimony of Larry Finley)

Mission Beach, especially after what happened at Pacific Square. We were competing, and I wouldn't take half of what had been a full attraction at the Square. That is the primary reason I wouldn't book Chester or Teagarden.

Q. But the real objection was, wasn't it, because they wanted to charge you the same price for two nights?

A. I stated my objection, Mr. Doherty.

Q. And you want to stand on that. A. Yes.

Q. Now, you remember this conversation down at the Trianon between Mr. Bishop and Mr. Howard and yourself after the contract was awarded that you have related in some detail? A. Yes.

Q. Did not also in that conversation something like this take place, that you told Mr. Bishop, in particular, that Mr. Dailard was paying too much for his bands and you were not going to pay M. C. A. the prices that Dailard was paying, in substance and effect?

A. I don't remember anything like that.

Q. Don't you remember saying that Dailard was paying M. C. A. bands too much?

A. I don't think I ever said anything like that. That is the comment in the trade, but that is not what I said. [749]

Q. You say that was known in the trade?

A. I say that is the comment in the trade, but I don't believe I ever said that to Mr. Bishop.

Q. The comment you had heard was that Mr. Dailard was paying too much for his bands at Pacific Square?

A. Yes, sir.

(Testimony of Larry Finley)

Q. Do you not remember saying in the same conversation that you were going to do business with M. C. A. on your terms and not on their terms, or words to that effect?

A. That is a deliberate misstatement; I mean that statement.

Q. But you did have a talk at that time with Mr. Bishop and Mr. Howard?

A. Yes. That I said I would do business on my terms, Mr. Doherty, is that what you said?

Q. Yes, that you were going to do business on your terms. A. Definitely not.

Q. Now, on your improvements out there at the Beach, you couldn't begin any improvements until January 3rd, could you?

A. No, January the—my lease stated that I took possession on January 3rd and Mr. Dailard's lease stated that he gave it up at midnight, December 31st, and I had a discussion with somebody from—either Dailard or Wakeland, [750] I don't remember, and the City Manager, whereby I agreed to let him run, to have his New Year's Eve, and we started in the day after New Year's, January 2nd, to take possession of the park.

Q. Well, you didn't begin any improvements, my question was, until after January 3rd?

A. That is approximately right.

Q. Those were war times, were they not?

A. Yes.

Q. And you had to get priorities for material?

A. Yes.

(Testimony of Larry Finley)

Q. Did you have to get priorities also for men?

A. I don't recall if we did or not. I contracted it out. We used mostly secondhand material, but I will state that all the building and all the altering we did was in strict compliance with the War Production Board.

Q. I am not questioning that, Mr. Finley. But you had to get priorities?

A. I don't recall if we did or not. As I say, whatever we had to do, we did; whatever we were supposed to do, we did.

Q. Were you able on January 3rd to say just when you were going to open? A. Yes.

Q. You were certain that you would have all your [751] repairs finished, irrespective of priorities, in 30 days?

A. No. You see, I started working—we didn't start any physical work before January 3rd, but the mental work I did much before that time. For example, my contract to paint the ballroom I let, I think, in December, the first part of December. My arrangement with the people, the decorators who painted the ballroom, was that every day over the specified time that they ran we would deduct, I think, \$500.00 from the price of the bid they gave me. That was all done prior to that.

Q. When did you definitely fix the date? What date did you fix February 3rd as your opening date?

A. When did I fix that?

Q. Yes.

A. I don't remember. Probably some time in December. I think it was some time—no, it was previous to December. We had our advertising out January 3rd. I

(Testimony of Larry Finley)

think I made up my mind on that date as soon as I got the lease, Mr. Doherty.

Q. That is, even before you decided what the repairs were going to consist of, you had fixed on your opening date?

A. I think I did. The lease stipulated the park could remain closed in the month of January for alterations, and I think I made up my mind at the time the lease was let.

Q. And you were sure you would get priorities in wiring, and all the rest of it? [752]

A. Well, I know on wiring we used nothing but second-hand wiring; and the morale—you see, in San Diego the park was very important to military morale, which helped us a great deal in getting things done.

Q. Now, I will show you Plaintiff's Exhibit 1, which is the pictures of Mission Beach Ballroom. Did you take those?

A. No, I did not.

Q. Were they taken under your direction?

A. Yes.

Q. Were you present when they were taken?

A. No.

Q. Who hired the photographers?

A. Either I hired them, or Mr. Austin hired them. I don't recall. I told Mr. Austin to have the pictures taken, and he had them taken.

Q. And who directed the taking of the pictures in Exhibit No. 10?

A. These particular pictures?

Q. Yes.

A. Well, they are all different. If I may say, this big sign—

(Testimony of Larry Finley)

Q. Who directed the taking of them?

A. Different people.

Q. Pardon me? [753] A. Different people.

Q. But who directed the taking of those pictures?

A. You mean who instructed them to take them, or who took them?

Q. Who employed the photographer?

A. I think I employed this top one. I employed the top and the bottom one, if I remember right.

Q. And who employed the other two?

A. And the other two, Mr. Austin.

Q. Mr. Austin? A. Yes.

Q. And Mr. Austin is your employee? A. Yes.

Q. You took them for the purpose of bringing them in as evidence in this case, did you not? A. Yes.

Mr. Doherty: Exhibit No. 10, your Honor, is the pictures of the Pacific Square that have been introduced in evidence.

The Court: I remember that.

Q. By Mr. Doherty: You testified yesterday as to Mr. Thayer, the vice-president of this defendant corporation. Did you have any knowledge of that?

A. Mr. Lyle Thayer I was speaking of.

Q. The gentleman that has been in the room, Mr. Thayer, and you said he was a vice-president. [754]

A. I thought he was vice-president.

Q. You have no independent knowledge of that, have you? A. No. I just took it for—

Mr. Doherty: I was going to ask the witness some questions about profits and losses on the operations, but in view of the status of the record, and because the audi-

(Testimony of Larry Finley)

tor is going to come on the stand, could it be understood that if I desire to recall this witness on that phase of the examination, we may do so?

Mr. Christensen: We won't raise any objection if you want to go ahead now. I will not raise any objection.

Mr. Doherty: I don't want to raise those questions with this witness unless—

The Court: I think I understand what you mean. If that is all, only that one subject-matter, that you desire to reserve—

Mr. Doherty: May I ask associate counsel here whether or not I have overlooked anything, your Honor?

The Court: Yes. I think we will take our recess now, ladies and gentlemen. Remember the admonition and keep its terms inviolate.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Christensen: Mr. Doherty—

Mr. Doherty: I just wanted to ask one more question. [755]

Mr. Christensen: Go right ahead, sir.

Q. By Mr. Doherty: Mr. Finley, you spoke of some trips to New York, one to employ Jimmy Dorsey. Is that correct? A. Yes.

Q. Jimmy Dorsey is represented by the General Amusement Corporation? A. That is correct.

Q. And who is the local representative of the General Amusement Corporation? A. Ralph Wonders.

Q. You found it necessary, even though General Amusement Corporation and your friend, Ralph Won-

(Testimony of Larry Finley)

ders, were representing him, to go to New York and to engage Jimmy Dorsey direct?

A. No, that is not so, Mr. Doherty.

Q. Did you go to New York to engage Jimmy Dorsey? A. I engaged him while I was in New York.

Q. While you were in New York? A. Yes.

Q. You went to New York for other purposes?

A. Other booking purposes, yes.

Q. And not to engage Jimmy Dorsey?

A. Not specifically to engage Jimmy Dorsey, no.

Q. And on that trip you claim you spent something like two or three thousand dollars? [756]

A. I don't think I claimed that, Mr. Doherty.

Q. Or \$1500.00?

A. That is more like it, yes.

Q. Yes, you are correct. I have this one confused with the one for Tommy Dorsey. You went East to see Jimmy Dorsey in March, 1945, and the trip cost you \$1500.00? A. That is correct.

Q. And that is one of the items of damage you are charging here?

A. Yes. The trip was for general booking purposes and to become familiar with the band leaders in New York, to lay the groundwork for direct booking.

Q. In other words, it wasn't just to book a band, the Jimmy Dorsey band, but you went there for general booking purposes and to become better acquainted with the situation in the entertainment field?

A. No, that is not so. I went back for the purpose of booking not only Jimmy Dorsey, but to get acquainted with such people as Sammy Kaye, and other band leaders who were back there, so that I could lay the groundwork

(Testimony of Larry Finley)

for future booking. That was my purpose in going to New York when I booked Jimmy Dorsey.

Q. And that you are claiming as one of the elements of damage here?

A. That was part of my expense in the operation of the [757] ballroom, Mr. Doherty.

Q. Now, about 45 days later you went back to see Tommy Dorsey? A. That is correct.

Q. At that time you had under consideration the arrangement at the Casino at this beach room down here at Ocean Park? A. That is not so.

Q. That is not so? A. That is not so.

Q. It had not come up at that time?

A. No, it had not.

Q. That came up in New York?

A. It came up while I was in New York.

Q. And that prolonged your stay?

A. No, it didn't. It didn't prolong my stay. Both Mr. Eastman and Mr. Michaud came out to the West Coast to consummate that deal.

Q. Now, you spent \$2,000.00 on that trip?

A. I think I spent more than that on that trip. There was quite a bit of entertaining on that trip.

Q. Is that the time you went out to the gambling house and had a big dinner, and so forth? Was that the trip?

A. I can't help myself here. I don't know anything about what you are speaking, Mr. Doherty.

Q. Didn't you tell either Mr. Barnet or Mr. Bishop that [758] on one of your trips to New York they had

(Testimony of Larry Finley)

come and called for you and taken you out to a big gambling house and for dinner?

A. That is the payoff. Yes, I had dinner at a place where there was gambling. However, I am not in the custom of gambling, Mr. Doherty.

Q. Mr. Finley, I don't say that you gambled. I said you went out to a gambling house.

A. I am sorry. I beg your pardon, Mr. Doherty.

Q. You went out there?

A. Yes, I went out there and had dinner.

Q. And there was gambling there?

A. I believe there was. I wasn't in the gambling room, but there was gambling there, I believe.

Q. And you had a big dinner there? A. Yes.

Q. And you paid for it?

A. No, I didn't pay for it?

Q. You did not?

A. No, I didn't pay for that dinner.

Q. What is your transportation from here to New York, Mr. Finley?

A. I don't have any idea. I don't take care of that, Mr. Doherty. My office buys it for me.

Q. And you haven't any idea what it costs to go from here to New York by railroad or air? [759]

A. No, strange enough, I don't, Mr. Doherty. I don't have any idea.

Q. That is clear over your head? A. Yes.

Q. Do you know what your hotel bill was?

A. It was quite high.

Q. What hotel did you stop at?

A. At the Waldorf.

(Testimony of Larry Finley)

Q. And how many rooms did you have?

A. What trip are you speaking of, Mr. Doherty?

Q. We will take the Jimmy Dorsey trip that cost \$1500.00.

A. I had one room on that trip. Oh, I beg your pardon. I was not at the Waldorf on that trip. I was at the St. Moritz, and I paid \$8.80 for a suite, if I recall right.

Q. That was a suite of rooms? A. Yes.

Q. And those were under a ceiling price, relating back to some date in 1945?

Mr. Christensen: That is objected to as calling for his conclusion or opinion.

The Witness: I can answer that, Mr. Christensen, if you want.

The Court: If you insist. I was going to sustain the objection, but if you insist, all right. [760]

The Witness: Well, the St. Moritz is a reputable hotel, and they have the prices posted in the rooms, so I imagine it is the ceiling price.

Q. By Mr. Doherty: How many days did you stay in New York?

A. I don't remember that now. I think I was there about three weeks.

Q. Two weeks?

A. Two or three weeks, I don't recall.

Q. Two or three weeks, and then you came back?

A. Yes.

Q. How long were you there when you went to get Tommy Dorsey?

A. I don't remember the exact number of days; two or three weeks.

(Testimony of Larry Finley)

Q. Where did you stop on that occasion?

A. I had a room at the Waldorf on that occasion. I couldn't get into the St. Moritz. I remember now.

Q. And if you stayed there two weeks, at \$2,000.00, it would be about \$150.00 a day?

A. Yes, that is approximately right, Mr. Doherty.

Q. And if you were there three weeks, about \$100.00 a day?

A. I think that is mathematically correct.

Q. I said about \$100.00 a day? [761]

A. Yes, about.

Q. But you spent more than \$2,000.00?

A. Yes, I think I did. As I said, I had to do an awful lot of entertaining.

Q. You were back there on private business, were you not?

A. I stated the reason for my trip back, Mr. Doherty.

Q. You went down to Washington, didn't you?

A. On the Tommy Dorsey trip, no, I didn't go back to Washington.

Q. On any of those trips did you go to Washington?

A. I was in Washington—I was in Washington the last, not the last trip. I was in Washington about six weeks ago. I spent two days there. It was incidental to my being in the East.

Q. Were you there during the Jimmy Dorsey trip?

A. In Washington? I don't believe I was. No, there was nothing I could do in Washington, so I had no reason to go down there.

Q. Now, respecting the climate in San Diego,—

A. Yes.

(Testimony of Larry Finley)

Q. —there are about 30 or 40 days of fog at Mission Beach and about 90 days in the city of San Diego; is that your estimate?

A. I did not state there were 30 or 40 days fog, Mr. [762] Doherty, please. I said there were 30 or 40 nights when there was fog at Mission Beach. That was my statement.

Q. Yes. And about 90 days or 90 nights, was it, in San Diego?

A. I was advised of that by the United States Weather Bureau at Lindbergh Park, which is about a half mile from Pacific Square, as to that record of 90 days or 90 nights of fog. That is what I had from them down there.

Q. But the number of days at Mission Beach is your own?

A. Remember, we only operated two nights a week.

Q. Yes.

A. Yes, I would say my own estimate, 30 or 40, the estimate of myself plus the people I have working for me.

Q. You have but one lease with the City of San Diego for the Beach?

A. That is correct.

Q. And that calls for the ballroom and the concessions?

A. Yes.

Q. Is that right?

A. Yes.

Q. You made a statement here this morning that your loss to December 31st on the ballroom was \$122,000.00?

A. Approximately that much, yes.

Q. And what was your profit on the concessions?

A. I don't recall. I could tell you approximately. [763] If I may see the statement, I can give you the exact figure, but it was quite profitable.

(Testimony of Larry Finley)

Q. Quite profitable?

A. It was in excess of \$100,000.00.

Q. You built the concessions to feed the ballroom, and built the ballroom to feed the concessions, didn't you?

A. That is your statement, Mr. Doherty.

Q. What would be yours, under those circumstances?

A. The ballroom is an independent operation of Mission Beach Amusement Park. There is a skating rink there. And that is an independent operation of Mission Beach Amusement Park. The Amusement Park itself is independent. It is broken up into three things, the skating rink, the ballroom, the park. The park—the revenue from the park could not go into the ballroom, and the revenue from the ballroom could not go into the park. Our park revenue is taken from the rentals, from the flats and percentages we have received from the concessionaires. The ballroom revenue is taken from the amount of money that is brought into the box office. They are two separate operations.

Q. Now, let me see if we understand each other, Mr. Finley. Is it to the interests of the ballroom to have large crowds out in the park?

A. Not necessarily, Mr. Doherty. We have had large crowds at the park with bad music inside, and we have done no [764] business.

Q. Well, is it to the interests of the concessions to have large crowds in the ballroom? A. Yes.

Q. Then the ballroom does feed the concessions?

A. I don't see that you can say it feeds it. The nights that the ballroom is closed there are still a lot of people in the park, and on Sunday afternoons the ballroom is not open and we are very busy in the park.

(Testimony of Larry Finley)

Q. Well, doesn't the attendance in the ballroom itself, those who go there, patronize the concessions?

A. Yes ,they do.

Q. And when you have a large crowd at the ballroom, that means you have a larger crowd than otherwise would be the case at the concessions?

A. That definitely would be the case.

Q. So that the ballroom does help to feed the concessions?

A. Yes, it does.

Q. Now, do you think that the concessions crowd, the park crowd, does not help to feed the ballroom?

A. No, I don't think it does, Mr. Doherty. That was proven by our operation. I speak from experience.

Q. In other words, from your operation of the enterprise, the way the concessions were operating, it does not help the [765] ballroom?

A. I stated before dancing is more or less a habit with some people, and if they go in the ballroom, if they go out during the intermission they will spend some money at the concessions, but if people go out to the park in bathing suits or in slacks to play fun games, or families go to the beach or park with their kiddies, they don't go in the ballroom. That is the way it works.

Mr. Doherty: I think that is all of this witness.

Q. By Mr. Doherty: Oh, just for accounting purposes, you keep the ballroom separate from the concessions?

A. How do you mean, just for accounting purposes, Mr. Doherty?

(Testimony of Larry Finley)

Q. You tabulate the income into the ballroom, and then you make certain charges against that operation?

A. I am sorry, you would have to ask my auditor about that. He is here. I am really not able to answer that question.

Q. Does the auditor keep your accounts?

A. No, we have bookkeepers to do that, but I have one auditor to supervise all of my activities for me.

Q. Whatever comes in at the ballroom or at the concessions is the money for yourself and Mrs. Finley, isn't it?

A. I am sorry, I don't understand that question, Mr. Doherty. [766]

Q. Whatever comes in in the way of cash, or other things of value—

A. Yes.

Q. Whether from the ballroom or the concessions, is the property of you and Mrs. Finley?

A. I don't understand that question. I am sorry. What do you mean by "things of value"?

Q. Has any one else any interest in it?

A. No, Mrs. Finley and myself are sole partners.

Q. And everything that is taken in there is the property of yourself and Mrs. Finley, after the debts are paid?

A. It is the property of Larry Finley and Associates. That is Mrs. Finley and myself, a co-partnership. That is right.

Q. Larry Finley and Associates is just merely the name under which you and Mrs. Finley operate?

A. And the name my employees work under, too.

(Testimony of Larry Finley)

Q. Have your employees any interest in your Beach concessions down there?

A. No, they don't, but my employees are termed associates instead of employees. Psychologically, it works out very good for them.

Q. Just psychologically? A. Yes.

Mr. Doherty: That is all. [767]

Re-Direct Examination

By Mr. Christensen:

Q. Mr. Finley, I am not quite clear on this paragraph in Defendants' Exhibit Q, which reads as follows:

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Radcliffe's; however, I understand that this booking has been filled."

Mr. Howard talked to you about Curt Sykes?

A. I talked to Mr. Howard about Curt Sykes. I had a band down there, Anson Weeks at the Trianon, and most of the boys in the band were comprised of Curt Sykes members, and Curt was down himself for a week or ten days—can you hear me—most of the boys down there were members, and Mr. Sykes was down there for a week or ten days and I got to know him.

Mr. Doherty: Could I have the question read to which this statement is an answer?

(The question and answer were read.)

Mr. Doherty: That is calling for a conversation between him and Mr. Howard.

(Testimony of Larry Finley)

The Court: Well, I understood counsel's question to ask him to explain that excerpt from the letter that you introduced in evidence.

Mr. Christensen: If that wasn't clear in my question, that is what I want. [768]

The Court: You didn't propound an interrogation. You just said you didn't understand it. I think you had in mind having him clarify it, and you should have interrogated him by a direct question, and then we would have avoided all this loss of time.

The Witness: Shall I go ahead, your Honor?

The Court: I think so.

The Witness: When I talked to Hal Howard I told him I had received a letter from Curt Sykes showing me he was finally getting out of his contract with M. C. A., and he wanted to work for me again at the Trianon Ballroom, or the Radcliffe, as it was known at the time, and I told Hal Curt was a good boy and I would like to see something done for him. He said, "Why don't you use him yourself?" And that was the sum and substance of the conversation, but my conversation with Howard was to the effect that Sykes was trying to get out of his M. C. A. contract, and was finally getting out of it.

Mr. Christensen: I see. That is all. You may step down, sir.

(Witness excused.)

Mr. Christensen: Jack Ostrow.

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [769]

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Jack Marvin Ostrow.

By Mr. Christensen:

Q. Mr. Ostrow, are you a certified public accountant?

A. Yes, I am.

Q. Your office is located where, sir?

A. In Los Angeles, on Hollywood Boulevard.

Q. You know Mr. Finley who was just on the stand?

A. Yes, I do.

Q. Were you employed by him in your capacity as a certified public accountant? A. I was.

Q. When?

A. Well, I still am. I would like to correct that. I still am.

Q. When were you first?

A. Well, when Mr. Finley returned from New York in, I guess it was August or September, 1944; although I had known him previously and had done some work for him while I was connected with a former firm by whom I was employed.

Q. Did you do some work for him at the Mission Beach Amusement Center, that enterprise?

A. Yes, I did. I started at the time that Mr. Finley got the lease at Mission Beach. [770]

Q. And what did you do?

A. Well, at the beginning I helped install the system of records to be kept at Mission Beach, and supervised

(Testimony of Jack Marvin Ostrow)

the keeping of those records by the bookkeeper; made routine trips down there to help discuss their problems in keeping the records, helping the bookkeeper, and doing the regular auditing, and I rendered statements, I believe, until July or August of 1945 from the date of the inception.

Q. Those books were then kept under your supervision, were they?

A. Yes, they were kept under my supervision, but I was completely an outside auditor, yes.

Q. What did the books consist of?

A. Well, there was the original records of receipts to the various concessionaires, and box office reports from the cashiers. From there they were entered into the usual journals, the cash receipts, disbursements, invoice and general journal, and carried up on through the general ledger, to reflect the various activities that the park was engaged in and the volume done.

Q. In auditing those books, what did you do to check the validity of all the entries, sir, if you did anything?

A. Well, the accepted auditing standards, with particular emphasis there on the receipts from the various sources, because the City leases provided for a rental based on percentage, which [771] required a monthly certification to the City of San Diego of the gross receipts, and I had to certify to those reports, as well as making the adjusted entries and checking the invoices, and so forth, to substantiate the various expenditures.

(Testimony of Jack Marvin Ostrow)

Q. Did you make and deliver to Mr. Finley quarterly statements?

A. At Mission Beach, I believe during the period that I was employed I rendered a statement as of February 28, which was the end of the fiscal year.

Q. May I interrupt you at this time and ask you to examine Exhibit 12-A, for identification, and ask you if that is the report to which you have just made reference, sir? Take your time and be sure that it is.

A. Yes, this is the report.

Q. And from what source did you get the figures which are there reflected?

A. From the general ledger and other substantiating records of the Mission Beach Amusement Park, operated by Larry Finley and Associates.

Q. Does that exhibit which you now have in your hands fairly and truly reflect the statement as it existed on, or at the close of business on February 28, 1945?

A. Yes, in my opinion, it does.

Mr. Christensen: May I offer this one in evidence at this time, your Honor? [772]

Mr. Doherty: Subject to the objection I heretofore made, your Honor, that as to these defendants it is incompetent, irrelevant and immaterial, and not within the issues of the case, not a type of evidence that is admissible in this type of case to establish a measure of damages; no foundation laid, and no showing of conspiracy or combination.

The Court: Read the last statement of counsel, please.

(The statement was read.)

Mr. Doherty: May I add also to that that, and this is from what my associates tell me, at the pre-trial hear-

(Testimony of Jack Marvin Ostrow)

ing there was no contention made, in fact the very opposite, that this type of evidence was the measure of damages; that the measure of damages at the pre-trial hearing was on the basis of loss of prospective profits.

The Court: Of course, that may be true, and yet that would be no ground to exclude a financial report. The court will be required to state the rule concerning the measure of damages at the appropriate time. That is not this time. I am not indicating anything concerning the value or weight of this evidence, ladies and gentlemen, but it is competent evidence to be received, and the objection, therefore, is overruled.

(The document referred to was marked Plaintiff's Exhibit No. 12-A, and was received in evidence.)

Q. By Mr. Christensen: Mr. Ostrow, did you prepare a [773] report as of the close of business of May 31, 1945, covering the Mission Beach Amusement Center?

A. Yes, I did.

Q. Will you please look at Exhibit 12-B, for identification, and tell me if that is the report which you furnished?

A. Yes, it is.

Q. Does that fairly and truly represent the accounts and matters and things therein set forth?

A. Yes, in my opinion it does.

Mr. Christensen: I offer this as of the exhibit next in order, and ask it be known as 12-B in evidence.

Mr. Doherty: The same objection, your Honor.

The Court: The same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 112-B, and was received in evidence.)

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Christensen: Did you likewise prepare a report, a financial statement, as of the close of business of July 31, 1945, sir?

A. Yes, I did, but I believe I had rendered one on June 30th, too, as I remember it.

Q. Maybe you did, sir. Will you bear with me just a moment? Do you have there a copy? I beg your pardon. It has been furnished to me here. This looks like the copy.

Mr. Christensen: Mr. Doherty, I will be glad to have you [774] inspect it.

Q. By Mr. Christensen: (Continuing) You have told me that you prepared a financial statement as of the close of business of June 30th, 1945. Please look at this document, which has not heretofore been marked, and tell me if that is the statement which you have just referred. [775] A. Yes, it is.

Q. And is that a true and correct report of the financial matters therein reflected? A. I think it is.

Mr. Christensen: May this be received into evidence and marked as the last number on—

The Clerk: That will be 12-G.

Mr. Christensen: 12-G, your Honor?

The Court: What period is covered by that?

Mr. Christensen: It is entitled "As of June 30." But the witness, I think, could better answer the question.

The Witness: It covers the period of operations for the month of June and for the period March 1, 1945 through June 30, 1945.

The Court: It may be so marked.

Mr. Christensen: 12-G.

Mr. Doherty: The same objection.

(Testimony of Jack Marvin Ostrow)

The Court: The same ruling. Of course, I am assuming that you have here available for inspection to your opponents the supporting documents of these financial statements.

Mr. Christensen: I will have them here in the morning. The bookkeeper would not come up on the airplane this afternoon and is driving up, and I think that at noon-time she will be here.

(The document referred to was marked as Plaintiff's Exhibit 12-G and was received in evidence.) [776]

The Court: Before I would permit them to be used before the jury, I want those here so the other side can go into them fully if they desire.

Mr. Christensen: They are on their way, your Honor; and I regret that she would not fly up with them. She insisted upon driving. They will be here the first thing in the morning.

The Court: You understand the ruling, now, do you, gentlemen, that these matters will not go before the jury until such time as the supporting documents are available in the courtroom for your inspection and for a thorough examination by either yourselves, assisted with such auditing force as you desire to examine them.

Mr. Doherty: That would mean as to the "courtroom", your Honor, also the clerk's office, from the standpoint of convenience?

The Court: Oh, yes. I think we can arrange that by stipulation.

(Testimony of Jack Marvin Ostrow)

Mr. Christensen: I am sure Mr. Doherty and I can get together on that.

The Court: They will all be in the custody of the court, subject to the examination of both sides until this case is concluded, and none of these financial statements or auditors' reports will be received into evidence, technically, so that the jury may consider them or so that any argument may be [777] made concerning them until such time as the supporting physical documentary evidence is before the court for inspection by both sides.

Mr. Christensen: I understand that.

May I proceed, then?

The Court: Yes; you may.

Q. By Mr. Christensen: Did you likewise prepare a financial statement as of the close of business of July 31, 1945, sir? A. Yes; I did.

Q. Please look at Exhibit 12-C for identification and tell me if that is the document to which you have just referred? A. Yes; I believe it is.

Mr. Christensen: May it be received under the same understanding, as our Exhibit 12-C?

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to, heretofore marked as Plaintiff's Exhibit 12-C, for identification, was received in evidence.)

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Christensen: You did not render a statement thereafter? I see these bear the name of Mr.—

A. No; I did not render them.

Q. Hansen and Hallowell? [778]

A. Yes.

Mr. Christensen: You may examine, Mr. Doherty. I have Mr. Hansen here and will introduce these others in just a moment.

Mr. Doherty: It would save time, your Honor, if I examined him after we had a chance to look at the records.

The Court: Yes, indeed. You may defer your cross examination until later.

Mr. Christensen: I take it, then, that he may step down, but he should remain here subject to call; am I correct, sir?

The Court: That is correct.

Mr. Christensen: You understand that. Mr. Hansen please.

Your Honor, counsel and I agree that he may go. Mr. Ostrow, you may leave now, but you will report here the first thing in the morning, say by ten o'clock. I mis-spoke myself. 10:30, isn't that correct, tomorrow morning?

The Court: Yes. We have the empanelment of the Grand Jury at 9:30.

Mr. Christensen: 10:30.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [779]

Direct Examination

By Mr. Christensen:

Q. Your name, sir, is? A. Eugene A. Hansen.

Q. Mr. Hansen, you are a public accountant, are you not, sir? A. Yes.

Q. And you have and now are employed by Mr. Finley in that capacity, that is to say, as public accountant?

A. That is right.

Q. And as such are you acquainted with the books and records of the Mission Beach Amusement Center?

A. Yes, sir.

Q. And are they kept there under your direction and supervision? A. Yes.

Q. And have been, I believe, since—will you state the date?

A. I rendered the first operating statement for the month of August.

Q. August of 1945, sir?

A. That is right. Then there was two—one rendered for two months.

Q. I beg your pardon?

A. September and October was rendered as one statement. [780]

Q. Well, I have one as of September 30, 1945.

A. That is right.

Q. One as of October 31, 1945? A. That is right.

(Testimony of Eugene A. Hansen)

Q. And one as of December 31, 1945?

A. That is right.

Q. Is there another one?

A. No; that is right. August and September are combined.

Q. Oh, those two are in there. I beg your pardon. I did not understand correctly what you said. Mr. Hansen, I hand you here Exhibit 12-D for identification, which appears to be a statement of financial condition, Mission Beach Amusement Park, as of September 30, 1945. Please examine that and see if that is the document to which you have just referred?

A. Yes, sir.

Q. Does this truly and fairly represent the matters and things therein reflected?

A. Yes.

Mr. Christensen: Under this same understanding, as our Exhibit 12-D into evidence.

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to was marked as Plaintiff's Exhibit No. 12-D and was received in evidence.) [781]

Q. By Mr. Christensen: I hand you here Exhibit 12-E for identification, which appears to be a statement of financial condition as of October 31, 1945. Please examine that and tell me if you prepared that, sir?

A. Yes.

Q. And does that, too, truly reflect the matters and things reflected and therein set forth?

A. Yes.

Mr. Christensen: Under the same understanding, as our Exhibit 12-E into evidence.

(Testimony of Eugene A. Hansen)

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

(The document referred to was marked as Plaintiff's Exhibit 12-E, and was received in evidence.)

Q. By Mr. Christensen: Did you likewise prepare a statement of the financial condition of Mission Beach Amusement Park as of December 31, 1945, sir?

A. Yes; I did.

Q. Will you please examine this document which has heretofore been marked as Exhibit 12-F, for identification, and tell me if that is the exhibit to which you refer?

A. Yes.

Q. Is that, too, a true and accurate report?

A. Yes, sir.

Mr. Christensen: Under the same understanding and agree- [782] ment, as our exhibit 12-F into evidence, your Honor.

Mr. Doherty: The same objection.

The Court: The same ruling, with the same reservation.

Mr. Christensen: That is all I wanted to ask Mr. Hansen. And may we have the same agreement that he may leave now and return at shortly before 10:30 o'clock tomorrow morning for your examination, after the books and records have been made available to you?

Mr. Doherty: What time will the books be here tomorrow?

Mr. Christensen: Mr. Doherty, would you permit me to call you at your office after we adjourn, when I can

(Testimony of Eugene A. Hansen)

make a more accurate check, except I can only tell you I am advised they are on their way, and that she would not take a plane and insisted upon driving?

Mr. Doherty: Call Mr. Warne, if I would not be in.

Mr. Christensen: Or I may have Mr. Jaffe call you.

You may be excused, then, Mr. Hansen, until 10:30 tomorrow morning.

(The document referred to was marked as Plaintiff's Exhibit 12-F, and was received in evidence.)

Your Honor, that was agreeable with you, was it not?

The Court: Yes; that is satisfactory.

Mr. Christensen: Mr. Stutz, please. [783]

WALTER R. STUTZ,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Walter R. Stutz.

Direct Examination

By Mr. Christensen:

Q. Mr. Stutz, you are the Walter Stutz that is now connected, in some capacity at least, with the Pacific Square ballroom of the City of San Diego, are you not?

A. That is correct.

Q. What is your capacity there, sir?

A. I am the general partner.

Q. And who is the other partner?

A. There are four limited partners.

(Testimony of Walter R. Stutz)

Q. Will you state the names, sir?

A. Lillian Hiestand, Lewis Stutz, Sam Stutz, and the next you will have to help me with. It is an estate; it is Bernice Gantert, and it is in the process of probate.

Q. Could you spell that at least phonetically, please?

A. G-a-n-t-e-r-t.

Q. Does anyone else have any interest whatsoever in that ballroom? A. No. [784]

Q. When did you acquire it, sir?

A. July the 1st, 1945.

Q. Since that time has Mr. Dailard been connected with that in any capacity? A. None.

Q. Has he not assisted you in the booking of bands?

A. Not in the booking of bands; no.

Q. In any way?

A. In no way has he assisted me. We have discussed policy, and I haven't seen Mr. Dailard, I don't believe, over two times, two or three times until this trial.

Q. You have brought, pursuant to my request, a profit and loss statement, or financial statement?

A. That is correct.

Q. Covering your operation of the Pacific Square for the period July 1 to December 31, 1945, sir?

A. Yes; I did.

Q. Let me have it.

A. Do you have the letter there?

Mr. Christensen: No, sir; I do not.

A. Here is the original copy here, the original letter from my auditor.

Mr. Doherty: May I ask the witness a question?

Mr. Christensen: Why, yes, sir.

(Testimony of Walter R. Stutz)

Mr. Doherty: Have you carbon copies of what you just [785] gave him?

The Witness: Yes.

Mr. Doherty: May I have them, please?

The Witness: Yes.

Q. By Mr. Christensen: The letter which you handed me appears to be on the stationery of your accountants and auditors, Messrs.—will you pronounce it?

A. Fibiger-Warren & Company.

Q. They appear to be located in the San Diego Trust & Savings Building in the City of San Diego?

A. That is correct.

Q. So that you will not need to leave this letter, it advised you that they had not audited these statements due to income tax pressure in their office at the present time. However, the figures for this report were filed from monthly totals as shown by books of account which appear to be in order. I correctly read that, did I, sir?

A. That is correct.

Q. Did you ever operate the ballroom, or any ballroom, prior to July 1, 1945, sir? A. No.

Q. Prior to that time you had the liquor concession at the Pacific Square ballroom, did you not, sir?

A. That is an outside concession. Yes.

Q. It is located in the Pacific Square ballroom, however? [786]

A. No; it is a separate building located on the property that Pacific Square is located on, but not in the ballroom.

Q. It is part of the same building, isn't it?

A. No; it is a separate building.

(Testimony of Walter R. Stutz)

Q. Who operates the concessions there in the ballroom at this time?

A. The Pacific Square Amusement Company.

Q. And you keep your receipts derived from the concessions separately from that of the ballroom generally, is that right?

A. It appears to have been picked up in that way by the auditor, yes. There are separate revenue positions, and the totals are picked up that way.

Q. And who advised you to make the statement or have that statement made in this fashion, Mr. Stutz?

A. To have it made in what fashion?

Q. Oh, showing your concessions operations separate from the ballroom operations?

A. Well, nobody advised me as to that. I asked Mr. Fibiger to give me the breakdown of the ballroom, the box-office, the checkroom, and the soda fountain.

Q. Are there any other concessions there, sir?

A. That is all.

Q. From this statement it appears that your total receipts from the ballroom proper, excluding the concessions, [787] was \$181,911.18; is that correct, sir?

A. Including the rental income; that is right. 181—that is right.

Q. Now, against that you have charged expenses totaling \$194,154.61; is that correct, sir?

A. That is correct.

Q. And, for or from your concessions, you show a total concession profit of \$20,175.60?

A. Well, with this addition—

Q. Oh, yes? A. —\$20,269.39

(Testimony of Walter R. Stutz)

Q. I see. A. That is correct.

Mr. Christensen: All right. Thank you very much, Mr. Stutz. May we have this marked for identification at this time?

The Witness: Yes.

Mr. Christensen: For identification, our Exhibit will be 13.

The Clerk: Plaintiff's Exhibit 13 for identification.

(The document referred to was marked as Plaintiff's Exhibit 13 for identification.)

Mr. Christensen: Thank you.

Mr. Doherty: May I ask counsel why it should not be introduced into evidence, because, as for identification, it is not [788] in evidence and there will be no other witness who can introduce it into evidence who will lay any foundation excepting this witness, unless you bring in an accountant.

The Court: You should not ask him to introduce anything. Let him try his own case.

Cross Examination

By Mr. Doherty:

Q. Mr. Stutz, have you any other business activities or concerns other than the Pacific Square ballroom?

A. Yes, sir.

Q. Where is it located?

A. I have a number of activities in San Diego, the Walter R. Stutz Enterprises, which is an operating partnership, operates a chain of cocktail bars, gift shops, off sale liquor stores, and an arcade.

(Testimony of Walter R. Stutz)

Q. And this is just one of your activities?

A. That is just one.

Q. And from July 1, 1945 to December 31, 1945, you showed a net loss of operating the ballroom of \$12,243.43?

A. That is for the ballroom operation; that is correct.

Q. And during that period of time did you have what is known and described here as name bands operating at Pacific Square?

A. That is correct.

Mr. Doherty: That is all. [789]

Redirect Examination

By Mr. Christensen:

Q. How many name bands were submitted to you by Music Corporation of America between July 1, 1945 and December 31, 1945?

A. Well, we run on a three-night week, operating Friday, Saturday and Sunday, and the submissions, as a matter of fact, or bookings, I would say, and including 26 weekends, there would be 26 submissions, together with others that I discarded.

Q. Did you use any bands from any other agency other than M.C.A.?

A. Yes; there was Ault in August.

Q. Other than Georgie Ault, anyone else?

A. There was a Del Courtney booking.

Q. I beg your pardon, sir?

A. Del Courtney, which is a band booked.

Q. He has not played yet?

A. He has not played; he is booked.

Q. How far ahead are you booked now with bands?

A. We run spot booked into March, the latter part of March, and I think there is a few in April.

(Testimony of Walter R. Stutz)

Q. Mr. Bishop does the booking for you, does he?

A. Mr. Bishop of M.C.A.

Q. Yes?[790]

A. He assists with the submissions and I confirm the bookings; yes, sir.

Q. You bought Georgie Ault through Bishop, didn't you?

A. I believe that submission came through; yes.

Q. And Del Courtney, also; that is right, isn't it?

A. Yes; I think that was submitted and approved by myself.

Q. And Mr. Dailard has been assisting you and advising you in your band selections, hasn't he?

A. No. Mr. Dailard and I, I don't believe have seen one another over two or three times since I acquired the Square. Mr. Dailard spends considerable time in Los Angeles and I haven't had the opportunity to visit with him.

Mr. Doherty: Just one question or series of questions, your Honor, I forgot to ask this gentleman. I don't know whether he can answer them or not.

Recross Examination

By Mr. Doherty:

Q. How long have you lived in San Diego?

A. Since 1916.

Q. Were you there during this so-called boom period, when the soldiers and sailors were there in the vicinity?

A. I have operated all through that period.

Q. Have you operated, been in business since that time, continuously? [791]

A. Continuously.

(Testimony of Walter R. Stutz)

Q. You had at one time an interest, did you not, with Mr. Dailard in the Pacific Square?

A. That is correct.

Q. And you sold your interest to him?

A. That is right.

Q. Have you observed during the period since the Japanese surrendered any trends respecting attendance at places of amusement that you know about in San Diego?

A. Yes. The overall picture in San Diego on what we call business, where there would be attendance, the gross is off about 35 or 40 per cent. Some places are affected 25, some 40. My houses are off at least 25 to 30 per cent.

Q. Before the Japanese surrendered did you have a great number of servicemen in that area that were headed for overseas?

A. Yes.

Q. And since that time have you had a great number who have come through San Diego on their return from overseas?

A. There has been considerable come through; yes.

Q. Have you had an opportunity to observe their tendency as to spending money and things of that sort, between those who were going overseas and those who have returned?

A. Yes. Those that were going overseas and all during this period from '41, '2 and '3 that I have operated through, had a feeling that they were going to be shipped out, or they [792] are on call, they are going to die tomorrow, anyhow; and they spend their money much more freely, far more freely than those who are returning. That has affected my receipts all over, in all my places.

(Testimony of Walter R. Stutz)

Q. Have you noticed any change in their attitude respecting behavior between those that were going out overseas before the Japanese surrendered and those who have returned? When I say "those who have returned" I mean the veterans?

A. well, those that were going out had just kind of a "devil-may-care" attitude as a whole; and those that are returning, outside of some cases that we call psycho—I mean we have just given that name, I will say, down there amongst the operators in the amusement field particularly—they are of a little solid thinking; they have adjusted themselves to returning to their civilian life. And there seems to be a marked distinction of the two, those going and those returning, outside of those few spotted cases.

Mr. Doherty: That is all.

Redirect Examination

By Mr. Christensen:

Q. You never really got very close to servicemen, did you?

A. Myself?

Q. Yes.

A. Well, I am the largest operator in San Diego in the [793] liquor business, and I live in my places 24 hours a day. I police all my floors, and I can be found in one of them from the time I go to my office and do my daylight work, from 5:30 to 6:00 o'clock, on into the evening, I will be at one of my places until one o'clock at night, and that keeps me in touch with them very close.

Q. And occasionally there is some sailor, soldier or marine who does not spend all his time in a liquor place, isn't there.

A. Oh, quite certainly, quite definitely.

(Testimony of Walter R. Stutz)

Q. Mr. Stutz, didn't you know from your own experience with these servicemen, that before they went overseas they were building up their insurance and they had thoughts on that and taking care of their families, and that after they came back they were thankful that they were alive and having a grand time; don't you know that?

A. That is not true. I have stated the true facts of San Diego.

Q. That is all. That is all. You never were in any branch of the Armed Forces of the United States or any other country, were you?

A. No; I was not. I was too old.

Mr. Christensen: Thank you, that is all.

Your Honor, I have no further witnesses available.

The Court: The only other witnesses will be those [794] auditors in the morning?

Mr. Christensen: That is right, your Honor.

The Court: I think we will recess now, then.

Ladies and gentlemen, we have some work here that will occupy the attention of the court until about 10:30 tomorrow morning, so that if you will be here at 10:30 sharp, please, we will take a recess until that time. Remember the admonition in the meantime.

(Whereupon, a recess was taken until 10:30 o'clock a. m., Wednesday, February 6, 1946.) [795]

Los Angeles, California, Wednesday, February 6, 1946,
10:30 a. m.

The Court: All present. Proceed.

Mr. Doherty: If the court please, Mr. Clore Warne, attorney in this case, has prepared formal objections to the introduction of certain records in written form. May I hand a copy to your Honor?

The Court: Yes. Will you submit it to the other side, also?

Mr. Doherty: And a copy to the clerk, and a copy to the reporter, and a copy to Mr. Christensen.

Without the necessity of reading them into the record, may they be deemed to have been made in open court, and copied into the record, and your Honor made a ruling upon them? I only suggest that as a matter of saving time, if they may be deemed to have been read by your Honor and presented to the court.

The Court: Yes. Let me read them first.

That suggestion is satisfactory. That is satisfactory, Major.

Mr. Doherty: Yes, your Honor. And the objections deemed to have been made as presented in the written statement and may be deemed to have been ruled upon as you have already ruled upon the other matters, that is, objection is overruled?

The Court: The rulings that have heretofore been made [797] will remain in the record.

Mr. Doherty: Yes, your Honor.

The Court: As they have been heretofore announced.

Mr. Doherty: And your Honor is making the same ruling on these new objections as prepared by Mr. Warne?

The Court: I will consider that later.

(The document referred to was in words and figures as follows:)

“Defendants and each of them object to such evidence upon the grounds:

“1) That such evidence does not go to prove any element of damage recoverable or which can be considered by the jury under the facts proven in this case.

“2) That such evidence does not prove or attempt to prove any allegation or claim of damage asserted and set forth in plaintiff’s complaint.

“3) That said evidence is directly at variance with the basis asserted as a claim for damages in plaintiff’s complaint, and that asserted by way of statement by his counsel on the pre-trial hearing in this action and as asserted and claimed in his answer to Interrogatory XXVI heretofore propounded.

“4) It appears affirmatively that at the time the complaint was filed plaintiff had not suffered [798] any damage whatsoever and that it appears affirmatively and without contradiction.

“5) That said evidence does not prove or tend to prove the cause of action asserted and set forth in the complaint in that said complaint is premised upon a theory of a consummated wrong with damages accrued and that evidence of such damage must be as of the date the claim was asserted, to wit, the date of the filing of the complaint.

“(See particularly in support of this point decision and opinion in the case of Connecticut Importing Co. v. Frankfort Distillers. 101 F. (2d) 79, (2CCA, 1939).

“There is no foundation laid for said evidence in that there is no showing of any casual connection between any item of loss claimed to have been suffered and any acts or conduct upon the part of the defendants.

“6) That it appears that the figures and amounts offered by way of proof show a total claim on behalf of the plaintiff, Larry Finley, when it appears affirmatively and without contradiction that the business conducted and operated and as to which said loss is alleged to have been suffered was a co-partnership, an entity unto itself, and that the [799] partnership does not appear as a party plaintiff and that plaintiff cannot assert said claim in his own name on behalf of said partnership.

“7) That said evidence is incompetent, irrelevant and immaterial and not within the issue presented by the pleadings in said case and the claim made and asserted by said plaintiff.

“Frank P. Doherty

Harold F. Collins

Pacht, Pelton, Warne, Ross & Bernhard

“By Clore Warne

Attorneys for Defendants”

Mr. Doherty: Your Honor, I would like to have read into the record—I could call Mr. Finley on the matter, but I think probably counsel and I can agree, with your Honor’s consent to read the Interrogatories numbered XXVI and the answers to the interrogatories rather than calling Mr. Finley.

Mr. Christensen: Oh, yes.

Mr. Doherty: Because I deem it will be agreed that the interrogatories were asked of Mr. Finley and the answers contained were those of Mr. Finley.

Mr. Christensen: Yes, Mr. Doherty.

Mr. Doherty: Interrogatory No. XXVI: Questions by Mr. Warne and answers by Mr. Finley. [800]

"Question A: Does the plaintiff assert as a fact that he has suffered actual damages in the sum of \$1,000,000?

"Answer: Yes.

"Question C: State what elements constitute the damages plaintiff claims to have suffered and sustained, and upon what facts said claims are made and based.

"Answer: By obtaining proper bands for the park, I estimate that my profits should be in the neighborhood of \$350,000 a year, which not only includes profit from the ballroom but also revenue from the rest of the amusement park which is entirely under my control. As was evidenced by the Tommy Dorsey engagement, the revenue throughout the entire park was considerably increased when I was able to bring larger crowds to the ballroom. Better bands would result not only in bigger percentages from the concessionaires, but would enable me to receive greater rentals from concessionaires, as the ballroom is the principal attraction to the amusement park."

Mr. Christensen: It says: "to an amusement park," sir.

Mr. Warne: Correct. [801]

Mr. Doherty: I will read the last line again, Mr. Reporter.

"as the ballroom is the principal attraction to an amusement park.

"Question D: Does plaintiff claim or assert any loss of profits as an element of damage so suffered; and if so, in what dollar amount?

"Answer: Yes; \$350,000 a year.

"Question G: Does plaintiff assert any amount of damages after the date of the filing of the complaint in this action; and if so, in what dollar amount?

"Answer: Yes; the greater portion of the damages claimed, spread over the period of any three-year lease."

[802]

Mr. Warne: May it be shown further that those interrogatories were prepared and filed as of the 27th day of September, 1945, that being the date that they bear?

Mr. Christensen: That is right.

The Court: So that the jury will understand these features of evidence that are being offered, in cases of this type, ladies and gentlemen, the litigants, the parties to the suit, have a right to propound to each other or to one another, as the case may be, interrogatories, and the person so questioned is required to answer such interrogatories as the court orders to be answered, or if there be no objection interposed by the person questioned or the entity questioned, then the entity or the person answers those interrogatories, and those answers are filed in court together with the interrogatories. That is just what occurred in this case, and those that have been read were taken and occurred pursuant to that regulation, and you will consider that as evidence in the case. The weight of it, of course,—the value or weight of it is for you and not for the judge.

Proceed.

Mr. Doherty: I believe Mr. Ostrow was to take the stand for cross examination. [803]

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

Mr. Doherty: For the purpose of the record, your Honor, at approximately 10:00 o'clock the books of Mr. Finley from San Diego were brought to the clerk's office. The conversations were between Mr. Christensen and Mr. Warne. I don't know what time they arrived, but they were in the clerk's office at about 10:00 o'clock and are now being checked by our auditors.

The Court: Very well.

By Mr. Doherty:

Q. Mr. Ostrow, do you have your office in Los Angeles? A.: Yes, I do.

Q. The business that you do for Mr. Finley in San Diego, is that work done by you in San Diego?

A. Yes, it is.

Q. You make a trip down there and check the records?

A. That's right. I spend—I have made trips there every few weeks, spending anywhere from two to five days in San Diego auditing the records.

Q. Two to five days each trip?

A. Each trip, yes. [804]

Q. How much time did you spend in San Diego in connection with the work you did for Mr. Finley on his

(Testimony of Jack Marvin Ostrow)

books between January 1, 1945, and the completion of your report as of July 31, 1945?

A. Well, that would be a little hard to say because there were probably about eight trips or more during that period. I would have to recheck my records of time to see when I was there and how long I spent each trip.

Q. Give me an approximation, please. I am not going to try to check up on it, Mr. Ostrow, and your approximation will be satisfactory. That is a period of seven months.

A. Seven months. I would say I spent about 30 to 35 working days there.

Q. Did you have any—

A. And I had some assistants with me I think on two of those trips.

Q. That is assistants from your Los Angeles office?

A. From my Los Angeles office, yes.

Q. You found it necessary, did you, to set up a complete set of books?

A. Yes, it was a new enterprise and we had to keep records because of the satisfaction of the City lease, particularly of the receipts, so we set up a complete set of records.

Q. Were you at the same time setting up any records in [805] connection with the Trianon operation?

A. No, those records were set up by a local San Diego man. However, I did subsequently take over the auditing of those, of the Trianon ballroom.

Q. Some of your time in San Diego, then, was spent in connection with the Trianon records?

A. Yes, it was.

(Testimony of Jack Marvin Ostrow)

Q. Did you employ any of the staff that was working upon Mr. Finley's books, that is, those that did the actual signing of the checks and making of the vouchers and the entries in the books?

A. You mean, did I hire them?

Q. Yes. A. No, I did not

Q. They were people that were hired by Mr. Finley?

A. Or his office down there, yes.

Q. Yes. Did you, or your assistant from your office, make the entries in the various books that were kept for the so-called Mission Beach operation?

A. As a usual practice, no. However, on one or two occasions, when they were behind, my assistant and I did help them in the posting of the general ledger.

Q. Did you take the records as they appeared on the face of the books as the basis of your audits that have been introduced here in evidence? In other words, did you look [806] at the books and observe the entries and then make your computations from the face of the records?

A. No.

Q. Or did you go back of the records?

A. No, I went back of the records to substantiate them in ordinary procedure, both the receipts, checking them through the bank, and the expenditures by checking the invoices and seeing they were properly distributed, in a test manner, as much as possible.

Q. You did that in each instance of each and every transaction?

A. Not each and every, no. That would be re-doing it, which is not ordinary accounting procedure. We do what is called test-checking, and I test-checked during the period.

(Testimony of Jack Marvin Ostrow)

Q. In other words, you made what is known as a check test? A. That's right.

Q. You made one statement for Mr. Finley which has been introduced here in evidence, as of February 28, 1945?

A. That's right. 1945, — yes, that is correct.

Q. And that included the period as of January 1st to February 28, 1945? A. That is correct.

Q. You have included in that report, which has been filed here, all the transactions that occurred in connection [807] with the enterprise as of January 1st to February 28th of that year?

A. During that period, yes.

Q. Yes. You didn't take into consideration that the ballroom was not in operation until February 3rd, did you?

A. Well, I don't follow the question. There were expenditures during January in preparation, and in getting the park ready and improving the park. There was pay roll incurred prior to February 3rd. Those were naturally taken into consideration as a part of the operations of that enterprise, yes, but the receipts did not come in until the date of the opening, and I believe that was February 3rd.

Q. That is what I want to understand, that you have included in your first report, as of January 1st to February 28th, the proper accounting for improvements, and repairs and salaries, and other charges, during the month of January, 1945? A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. What you did is you just made up a story of the business done there, irrespective of the date the ballroom opened?

A. Well, it was a new venture and I reflected the condition in the operations of that venture, yes.

Q. Now, I will hand you these various exhibits. I think I have them all, Mr. Ostrow. Then you can follow me, and [808] I will be quite brief on it. Turn to the February 28th item on Exhibit B-1, and I note that for the month of February the total receipts from the ballroom alone were \$18,351.48. A. That is correct.

Q. Is that correct? A. That's right.

Mr. Christensen: Mr. Doherty, would you permit me to interrupt you? Do you have copies of those so that I could be following them? Do you have your own office copies here?

The Witness: Yes. They are in my brief case.

The Court: You may get them.

The Witness: Thank you.

Mr. Christensen: I only had one carbon copy, Mr. Doherty, and I gave it to you.

(The documents referred to were handed to counsel.)

Mr. Christensen: Thank you, Mr. Doherty, for permitting the interruption.

The Witness: That was Schedule B-1, and not Exhibit B-1, Mr. Doherty.

Mr. Doherty: That is right. It is Schedule B-1 of the exhibit. The number is stamped on the front there.

The Clerk: 12-A.

Mr. Doherty: Exhibit 12-A.

The Court: Will you refer to the exhibits by number, as they are marked, as we go along. [809]

(Testimony of Jack Marvin Ostrow)

The Witness: Yes, your Honor.

Q. By Mr. Doherty: Is that figure I gave you correct?
A. That is correct.

Q. Then you have on that same schedule of that same exhibit, under expenses, this item of \$9,345.12. That was for the period of February for bands, doorman, cashiers, et cetera, was it not?

A. That is correct.

Q. That is only for the month of February?

A. Only for the month of February, yes.

Q. Then under that you also have the next item of \$7,100.00, entertainment fees. Now, that was solely for the month of February, too, was it not?

A. That is correct. It was solely for the month of February.

Q. How is that?

A. That is solely for the month of February.

Q. Yes. You also have there the item of \$789.10, maintenance and repairs; is that correct?

A. That is correct.

Q. Mr. Ostrow, if you just nod your head, this young lady will never understand what you are saying.

A. I am sorry, Mr. Doherty.

Q. Those were maintenance and repair expenses made in connection with the ballroom? [810]

A. That is correct.

Q. Those were in addition to the repairs and alterations made during the month of January, were they not?

A. That is correct, yes.

Q. Is that right? A. That's right.

(Testimony of Jack Marvin Ostrow)

Q. You have already included in there a more substantial sum, which you have taken into account in making up this record of February 28, the repairs and maintenance during the month of January?

A. No. Mr. Doherty, the major portion of the maintenance and repairs were capitalized, and were charged to what is known as leasehold improvements, or furniture and fixtures, as the case may be. In the case of these original repairs they were capitalized to leasehold improvements and amortized over the three-year life of the lease, and only the proportion charged, which would be in this instance $2/36$ th, since it comprised two months of those large repairs.

Q. I said you had taken them into account, the repairs and maintenance in January; you had taken them into account in making up this report?

A. Yes. I misunderstood you. I am sorry.

Q. That is correct? A. Yes, that is right.

Q. You did charge off in this report a portion of the [811] so-called capital account in making up this report? A. That is correct.

Q. But you did not charge as capital the additional item of \$789.10. You charged that to expense?

A. That is correct.

Q. Would you explain to me the nature of that maintenance and repairs that were made in February, that were charged to expense and not to capital, or do you remember?

A. Well, it would be a little difficult to recall, but the items would generally consist of—for example, in the ballroom on the floor they used a lot of soap, or conditioning, to keep the dance floor proper, which was used up

(Testimony of Jack Marvin Ostrow)

each month. That is a heavy portion of it, or items like brooms, and so forth, which would be absorbed in the normal course of business. I don't recall the items that made up particularly the \$789.00, however.

Q. But you feel that they were items of that character?
A. Yes, I do.

Q. You have on that same schedule traveling expenses, \$601.18, and you charged that off as an expense?

A. Yes, I did.

Q. Did you make any inquiry as to what those traveling expenses consisted of?
A. Yes, I did.

Q. By whom were they incurred? [812]

A. Primarily by Mr. Finley.

Q. Did it show to what point or points he traveled?

A. Yes, it did. There were quite a few trips, I remember, to Los Angeles and back, in connection, as he stated, with getting merchandise for the ballroom and in making arrangements for possible booking of bands, and contacting people in Los Angeles. [813]

Q. Was there any effort to break down those expenses to determine whether they were incurred in any respect in connection with any of the activities of the Trianon?

A. There was an attempt made; and since I do do the audit on the Trianon, I can say that there are charges on the Trianon books for what was felt was a proper share of the traveling expenses.

Q. Did you find a traveling expense item there in the Trianon for January and February, 1945?

A. I am sorry that I can't tell you right now.

Q. You cannot tell that?
A. No.

(Testimony of Jack Marvin Ostrow)

Q. Well, when you saw this item of traveling expenses did you check behind the entry to see what checks were issued and the purpose of the checks?

A. Yes; I did.

Q. In each instance? A. That is right.

Q. Now, turn to Schedule B-3 of Exhibit 12-A. I see an item there of salaries \$2,922.55. What salaries were they?

A. Well, they were men on the payroll who were employed to help in the advertising publicity in connection with Mission Beach. There were men employed during a good portion of the time which I did the audit, specifically for writing publicity and newspaper columns, or the radio plugs that was [814] incurred by Mission Beach. I don't know the individuals at this point, however.

Q. In other words, those were salaries for publicity men and advertising men for the Mission Beach enterprise? A. That is right.

Q. Then you have next, the item immediately under that: "Outside Fees \$950.00," and what were they?

A. They were outside publicity agents in Hollywood who made contact and helped place publicity in the trade papers, and so forth. I believe one of the names there was Barney McDevitt and Associates, as I remember it, and I believe there were others of the same nature.

Q. Then you have an item: Newspaper advertising \$4,127.03. Was that advertising in the San Diego papers?

A. That is correct.

Q. That is for the months of what, January and February? A. January and February.

(Testimony of Jack Marvin Ostrow)

Q. And you have no further breakdown of that other than that they were newspaper ads?

A. I don't follow you on "further breakdown," Mr. Doherty.

Q. I mean what type of papers; trade papers or—

A. No; they were primarily in the local papers, in the local San Diego papers. There was some in the trade papers, too. [815]

Q. And the item of: Posters \$3,494.92. Were those for posters in and around the San Diego area?

A. Yes; that is correct.

Q. And both the newspapers and the posters were for the entire Mission Beach enterprise?

A. That is correct.

Q. This last item of that schedule B-3, is \$1,633.05 miscellaneous. What did that consist of?

A. Well, during that period, during this particular month it was very high because there was a very large opening night, to which, as I recall, Mr. Finley had invited quite a few of the local dignitaries in San Diego as well as people in the trade, and had a catered dinner, or at least a buffet dinner, I should say, at the ballroom, at the opening under the new management of the park. That was, I would say from recollection now, the largest item in that "Miscellaneous" there.

Q. He put on a dinner for the important people in San Diego at the ballroom on the opening night?

A. As part of the opening. The ballroom was in operation and it drew out quite a large crowd that night.

Q. Well, but this particular item of \$1,633.05, you say the principal part of that was for this dinner?

A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. And entertainment to visiting dignitaries at the [816] opening of the ballroom?

A. That is correct.

Q. Now, you have under this item I have called off—and I have omitted some of the smaller items—a total expenditure of \$14,156.74, and you charge \$1,050.00 of that to the concessions, is that right?

A. No; that is not right. I did not charge it to the concessions, but the concessions leases, that is, the leases that Mr. Finley had with the individual concessionaires, provided for a payment by them of a weekly sum or a monthly sum for advertising.

Q. Yes.

A. And I deducted that portion which would apply to the park and the rest of it was for the ballroom advertising.

Q. Yes. But in your computation here, then, you charge this entire item that I read off to the ballroom?

A. That is right.

Q. Although the newspaper advertising and the publicity men and the posters were for the purpose of advertising the entire project?

A. Yes and no. If I may explain?

Q. Well, now, let us be specific. Didn't I ask you a few minutes ago whether or not the salaries of these publicity men and ads in the newspapers and the posters were not for the Beach project, and you said, "Yes"? [817]

A. Yes. Yes.

Q. But you charged it all to the ballroom in this Exhibit 12-A?

A. Well, Mr. Doherty, when you ask me "Beach project" I take the ballroom as part of the Beach project.

(Testimony of Jack Marvin Ostrow)

Q. It is a part of the Beach project, yes.

A. And the major part, from the point of view of this advertising, because I test-checked the lineage, the make-up of those ads, and practically all of it was for to announce the bands, the coming attractions at the ballroom. There was very little in the ads which went for the park other than the ballroom.

Q. You were not aware, then, of the policy that Mr. Finley had established of building up the ballroom as a feeder to the concessionaires?

A. I wasn't aware of the policy, no. I just checked the expenditures and that is the way I found them.

Q. Yes. In other words, that is the way they appeared on the books and that is the way you wrote them off in this report?

A. That is correct.

Q. Turn to Schedule B-4. You have there "Salaries, \$3,218.89." What were those salaries on?

The Court: Is that the same exhibit, Major?

Mr. Doherty: Exhibit 12-A, yes, your Honor. [818]

A. Well, those were salaries, as the schedule is headed, of the grounds and park maintenance men.

Q. That is, the various employees there?

A. That is correct.

Q. And in that connection you have the salary of a park manager for two months, \$1,950.00. Was that one individual?

A. I believe it was, although I do believe that there was a portion of the December salary in there.

Q. A portion of what?

A. Of the salary for December of this one particular individual.

(Testimony of Jack Marvin Ostrow)

Q. At the lower end of that schedule B-4 of this same exhibit, you have "Executive salaries, \$1,433.34." Whose salaries were those?

A. I am sorry, sir, I am not following. On B-4?

Q. Yes; it is B-5. It is on the same sheet. I was reading from the top of the sheet, Mr. Ostrow, and I note you have a memo on the margin there that the lower part is B-5. It is on that same sheet.

A. Yes. There was employed a park—that is, a top manager; I believe that they refer to him here as Mr. Austin. He is the salaried executive. There was another one at that time, I believe, too, a Mr. Birdell, but it does not—

Q. Mr. Austin was the park executive officer, is that [819] correct?

A. That is right, plus another one at that time, a Mr. Birdell, I believe.

Q. And that item was \$1,433.34 for what period of time?

A. For the period of January and February of 1945.

Q. On that same Schedule B-5, Exhibit 12-A, you have "Entertainment and Gifts, \$807.80." Did you verify what that was for?

A. Well, as best I could; yes. I verified that a great portion of them were gifts in San Diego to build up, as was explained to me, good will for the firm, particularly as this is a part of the Christmas period.

Q. You mean this included gifts made in December, 1944? A. That is correct.

Q. Were you aware of the fact that the lease with the City of San Diego was not effective on this undertaking until January the 3rd, 1945? A. Yes, I was.

(Testimony of Jack Marvin Ostrow)

Q. And you charged, however, items spent for Christmas gifts in December, 1945 (1944)?

A. Well, Mr. Doherty, I also charged the costs of preparing that bid in October to this because it was part of this operation.

Q. Mr. Ostrow, I did not ask you that. I said, didn't you charge as gifts made in December, 1944, for an operation [820] in January and February, 1945?

A. That is correct.

Q. And what did those gifts and entertainment consist of, if the record shows?

A. I am sorry. I wouldn't recall them now.

Q. Can't you remember any of them?

A. No. They were substantiated by the checks that were paid out or by invoices where they were bought from stores.

Q. And they were all represented by invoices?

A. Not all.

Q. Or by invoices and checks?

A. Yes, sir.

Q. In other words, you saw on a check in a given amount for gifts and entertainment, and you accepted that as a proper expenditure?

A. That is correct.

Q. And the checks were signed by Mr. Finley?

A. Either by Mr. Finley or by Mr. Austin or by Mr. Birdell.

Q. Did Mrs. Finley sign any of the checks?

A. No; I don't believe that she did.

Q. Are your books set up there on the basis of a partnership respecting this Beach enterprise?

A. I don't follow the question.

(Testimony of Jack Marvin Ostrow)

Q. Do your books and records show that it is a partner- [821] ship?

A. It is operated by the partnership; yes.

Q. And that partnership is Larry Finley and his associates, consisting of Mr. and Mrs. Finley?

A. That is correct.

Q. And your records so show?

A. That is correct.

Q. See if I can boil this down now in a sentence or two. Your ballroom income for February was \$18,351.48; that is Schedule B-1? A. Yes, sir.

Q. The expenses against that in the way of salaries, maintenance, traveling expenses, stationery, outside fees of these advertising agents, newspaper advertising, radio, posters, depreciation, and some of the other items I have called your attention to—and I am not attempting to cover all of them—aggregate a total expenditure—have you got those, Mr. Ostrow, compiled some place where they have all been totaled up for that February?

A. Are you referring to the operations of the ballroom department alone?

Q. Yes.

A. Schedule B-1, is that it, at the bottom of the schedule?

Q. I believe it does, yes. In other words, we will [822] have to take two or three items.

I will go back, Mr. Reporter, and ask Mr. Ostrow: The total income of the ballroom was \$18,351.48?

A. That is correct, sir.

Q. I am reading from Schedule B-1. Then you had a total there of three items of expenses, and including de-

(Testimony of Jack Marvin Ostrow)

preciation and advertising, namely, \$19,485.78, \$511.41, \$13,106.74; is that correct? A. That is correct.

Q. And that was a total outlay that you have charged against the ballroom for the months of January and February, 1945? A. No; that is not correct.

Q. Are there some other items that I have overlooked?

A. Yes. On Exhibit B-1—on Exhibit B-2—I am sorry—which precedes that, there are the portions of the general overhead items which is attributable to the ballroom.

Q. That is the item of \$5,169.75?

A. That is correct.

Q. And with those items added together and subtracted from the income, you showed a net loss for the ballroom for January and February, 1945, of \$19,243.15?

A. That is correct, sir.

Q. You made a separate report respecting the concessions? A. Yes, sir. [823]

Q. And that is also for January and February of 1945? A. Yes, sir.

Q. The concessions were in operation in January. were they not?

A. No; I don't believe that they were. They opened, I believe, at the same time that the park opened.

Q. And you charged, then, in this account, the expenses against the concessions even though they were not open for the month of January?

A. If they applied to the park operations, yes.

Q. And you had gross income from the concessions for that period, Exhibit B-1 of your audit, Plaintiff's Exhibit 12-A in this case, \$19,084.02? A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. And a net income for that period for the concessions of \$7,999.89? A. Yes, sir.

Q. And that gave you, then, a net loss for those two months of—you can figure faster than I can. Deduct those two items.

A. Well, it is a little over \$11,000, or do you want to have it exactly?

Q. It will give you somewhere between ten and eleven thousand dollars? A. Yes. [824]

Q. Is that right; or a little over \$11,000?

A. A little over \$11,000; yes, sir.

Q. Are the books set up down there on a separate basis for the concessions and the ballroom operations?

A. I don't follow the question.

Q. Are there two sets of books?

A. No; there are not two sets of books, no; but within the sets, the receipts are separately recorded from the separate enterprises and the expenditures are allocated, as is the statement, in the same manner that the statement is extended.

Q. You did not do any auditing work or service for Mr. Finley after July 31st?

A. Not at Mission Beach.

Q. In other words, your report goes up to the July 31st statement and not beyond that date?

A. That is correct, sir.

Q. Would you turn to the July 31st statement and look on the back of it and give the number of the exhibit in this case so the reporter will have it?

A. 12-C.

(Testimony of Jack Marvin Ostrow)

Q. Plaintiff's Exhibit 12-C. Turn to Schedule B-1. This report only covers the period from March 1st to July 31st? A. That is correct, sir.

Q. Both inclusive? [825] A. Yes, Sir.

Q. That is, March, April, May, June and July; that is five months? A. That is correct, sir.

Q. And it shows total revenue or income from the ballroom for those five months of \$115,182.63?

A. Yes, sir.

Q. And that, added to the figure for February of \$18,351.48; gives in round numbers \$153,500 income?

A. I believe, \$133,500.

Q. You are correct; \$133,500 in round numbers.

A. Yes, sir.

Q. For those six months. Then, you have total expenses for those five months, March 1 to July 31, as against the ballroom, including depreciation, advertising (\$126,208.18)

and publicity, three items, \$126,218.18, \$1,463.40, and \$40,012.65; and then, on B-2, an additional charge as against those operations of \$19,291.02—

Mr. Christensen: Would you show me where you are reading from, Mr. Doherty? I did not follow you. B-2?

Mr. Doherty: You are using Exhibit B-2 now.

Mr. Christensen: I was following Schedule B-2.

Mr. Doherty: It was B-2 in this. I don't want to refer to it as an exhibit.

The Court: No. 12-C, I think, is the exhibit. [826]

Mr. Christensen: Here they have denominated some of these "Schedule B-2" and some of them "Exhibit B-2", is where I fell off.

(Testimony of Jack Marvin Ostrow)

Mr. Doherty: Were you following me?

The Witness: Yes; and there was merely one correction. The total direct expenditures on Schedule B-1 on this report is \$126,208.18. I believe you read "218.18".

The Court: Now, you had not completed your examination, Major. You got to that item of \$19,000 when you were interrupted. Had you completed your question to him?

Mr. Doherty: I have finished with February. I am now on this exhibit.

The Court: I know. But when you were interrupted by Mr. Christensen you were interrogating about that item of \$19,000-plus.

Q. By Mr. Doherty: That is \$19,291.02?

A. Yes, sir.

Q. Did I misread that, Mr. Ostrow?

A. No; that one was correct.

The Court: No; you did not misread it. But you did not close your inquiry by asking whether that was to be added to the other figures.

The Witness: Yes.

The Court: Was it added?

The Witness: Yes; it was added to the other figures read. [827]

The Court: What is your total?

The Witness: Well, I don't have them, but it would be about \$180,000-odd, I believe.

The Court: What does that represent?

(Testimony of Jack Marvin Ostrow)

The Witness: Those represent all of the expenses chargeable to the ballroom, either through overhead or directly.

Q. By Mr. Doherty: During this period of five months, in round numbers—I am just running these off now—about \$187,000 chargeable to the ballroom?

A. Yes, sir; that would be correct.

Q. I may have missed it a couple of hundred. And, as against that, you have already testified you had income of \$115,182.63 for the five months?

A. Yes, sir.

Q. And taking this \$187,000 item, in order to get the full period for the 7 months you must go back to the February item and add in there the totals I just had of around about \$37,000 or \$38,000, wouldn't it be?

A. Yes; about \$38,000. Yes.

Q. So, in round numbers, you would have about \$225,000 of expenses and deductions for those 7 months?

A. Yes, sir.

Q. As against your income that you have already testified to? [828]

A. Yes, sir.

Q. Let us break that outline down just very briefly, so I won't tire you or the court or the jury. During those five months, according to Schedule B-1, there was \$40,000 in advertising and publicity, was there not?

A. Yes, sir.

Q. And the traveling expenses of \$8,642.46?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And maintenance and repairs, \$1,040.88?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Now, those traveling expenses of \$8,642.46 were in addition to the other item I called your attention to a while ago for January and February?

A. Yes, sir; which item was \$601.00, I believe.

Q. Yes. That would be about \$9,300.00 for the seven months in traveling expenses? A. Yes, sir.

Q. You followed the same procedure, did you not, in the matter of advertising as you did in the January and February report, of charging up posters, newspapers, fees of publicity men, outside fees of these agents, radio, and other matters to the ballroom operation?

A. Yes, sir. [829]

Q. Although they were advertising the entire project?

A. Well, yes, sir.

Q. During that period, your newspaper advertising—when I say “period” that is the five months, March 1 to July 31—was only \$8,398.43, wasn’t it?

A. Yes, sir.

Q. And your radio was \$5,416.23?

A. Yes, sir.

Q. And your posters, \$13,746.69? A. Yes, sir.

Q. What were the special events that cost \$1,777.40?

A. They had at the park particular attractions. I believe once they had a tight-rope artist or something in that nature out there for several weeks, but I don’t remember the type of acts. But they had 4th of July fireworks celebration, for example, fireworks, and so forth, at the park.

(Testimony of Jack Marvin Ostrow)

Q. And you charged that all against the ballroom department?

A. Well, again, Mr. Doherty, remember that from the total advertising we did deduct the portion of the fees recovered from the concessionaires which would be the concessionaires' portion of the advertising, and the balance would go to the ballroom.

Q. That was an arbitrary percentage that you deducted [830] from the concessionaires, was it not?

A. No; it was no percentage. It was the amount provided in the leasing agreement between Mr. Finley and the concessionaires.

Q. When I said "arbitrary percentage" I mis-spoke myself. That is an arbitrary fixed sum in the contract between Mr. Finley and the concessionaires?

A. Yes, sir.

Q. In other words, that came in whether or not Mr. Finley advertised or did not advertise?

A. No. He had to advertise the park up to that amount.

Q. Up to the amount of the concessionaires?

A. At least up to the amount of the concessionaires; yes.

Q. But he advertised seven times more, did he not? I will give you the figures.

A. Yes.

Q. You have got in here a total charged to the ballroom operation of \$46,877.65, March 1 to July 31, and you charged the concessionaires \$6,865.00, is that right?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. In other words, you charged \$40,000 against the ballroom operation and \$6,800 against the concessionaires?

A. Well, perhaps we don't quite agree again in terminology. You say I charged. That is not exactly what happened. [831] I did not charge. I had—

Q. Well, you credited?

A. I had all of the advertising expenses of the various forms in total, and then the portion that was recovered from the concessionaires was deducted from that. From the analysis and testing of the mediums of advertising and the contents therein, it was determined that the ballroom stood at least that proportion. [832]

Q. In other words, you deemed that a proper charge against the ballroom for them to have fireworks out in the park and a tight-rope walker?

A. I deemed that over-all, Mr. Doherty, the content of the advertising was, I would say, more than 90 per cent to the ballroom, and the total charge here was about \$46,000.00. Ten per cent to the concessionaires would only have been \$4600.00, and they paid for about \$6800.00. That is an estimate made, based upon the medium used, over-all.

Q. Well, to be specific let us get down to the tight-rope walker and the fireworks. You charged all of that, did you not, to the ballroom operation, less approximately 12 per cent, which went to the concessionaires?

A. Well, the tight-rope walker, as referred to over here, was \$1700.00. That is but a very small portion of the total \$46,000.00 that was spent on advertising. I don't follow your question clearly there.

(Testimony of Jack Marvin Ostrow)

Q. Well, look at Schedule B-3 of your exhibit.

A. Yes.

Q. Your total up here, including the tight-rope walker, is \$46,877.65. That is the total for salaries, outside fees, newspapers, radio, posters, and everything else?

A. Yes, sir.

Q. Then you had coming in from the concessionaires, \$6,865.00? [833]

A. Yes, sir.

Q. And you deducted that from the total expenditure of forty-six thousand plus dollars?

A. That was charged—

Q. To the ballroom? A. Yes, sir.

Q. And then you left a net charge against the ball-room operation for those purposes of \$40,000.00?

A. Yes, sir.

Q. Then didn't you charge approximately 88 per cent of the tight-rope walker and the fireworks to the ball-room?

A. Over-all, yes, if you pick out that one individual item. That is not the proper method of computing it. The net effect may be that you have questioned me about, but I didn't break each item in the expense account that way.

Q. No, you didn't break it that way, but isn't that the effect of the total? A. Yes, sir.

Q. You didn't take each item and break it down, but you totaled it all up and then deducted a credit for the concessionaires, and charged the balance to the ballroom?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Now, on Schedule B-4, you have an item of \$2,-892.50 for park manager. That is from March 1st to July, 1944, inclusive? [834]

A. Through July, yes, sir.

Q. That was one person, was it not?

A. Yes, sir.

Q. Who was the park manager at that time?

A. I believe during most of that time a Mr. Mulenkamp, Al Mulenkamp, was the park manager.

Q. What office did Mr. Austin have during that period?

A. Well, during some of that period Mr. Austin was in service, and when he was there he was one of the executive salaried men, over-all.

Q. Do your records show how many months he was in the service?

A. I believe they might. They would show, yes, because his salary was different then.

Q. He was in the service around about three or four months?

A. I don't recall the number of months, Mr. Doherty.

Q. When he wasn't in the service, what was his salary?

A. When he was not?

Q. Yes.

A. I believe he got \$1,000.00 a month.

Q. That continued up until July 31st. so far as you know?

A. No, I don't remember when he entered service, sir. I don't know when he went off salary. [835]

(Testimony of Jack Marvin Ostrow)

Q. Was he with Mr. Finley as of the month of July, 1945?

A. I am sorry, sir, I couldn't tell without an examination of the records.

Q. But your records do show while he was there he was getting \$1,000.00 a month?

A. Yes, sir.

Q. What job did he hold, according to your records?

A. Well, he did the over-all contact public relations for the park, and he has subsequently taken over complete management of the Mission Beach enterprise.

Q. In other words, Mr. Finley was not in charge, according to your records there?

A. I don't follow the question. Mr. Finley didn't draw a salary. Of the salaried people, Mr. Austin was in charge.

Q. But you said that Mr. Austin took over the entire management of the park?

A. I am sorry. I said subsequently. That was since July. I wouldn't speak of knowledge, during the time I was auditing.

Q. While he was there, did he take over complete management?

A. No, sir.

Q. So you don't know what happened later?

A. No. [836]

Q. Now, the concessions from March 1st to July 31st showed a net profit of \$40,450.00?

A. Yes, sir.

Q. And the ballroom, according to your statement here, showed a net loss for those five months of \$67,-247.00?

A. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. Making the net loss for the enterprise about, roughly speaking, \$27,000.00, or a little less than \$27,000.00?

A. That's right, sir.

Q. Turning to Schedule B-3 of Exhibit 12-C, what is that item of \$1,864.73, entitled "Miscellaneous"?

A. I would not be able to give you an itemization of it without an examination of the records, Mr. Doherty.

Q. Turn to Schedule B-5 of this same exhibit, and we find an item of \$2,602.24, under the heading, "Entertainment and Gifts." What is that made up of?

A. They were the same type of items that I had mentioned in the earlier report.

Q. Was there a dinner given every month to the dignitaries?

A. No, but it was a practice that during the early part of the ballroom operations there, at the opening of each new band, to have a little bit of an opening in the ballroom.

Q. In other words, there was something in the way of a [837] dinner to the dignitaries?

A. No dinner. I believe, from memory, the only time there was a dinner was at the grand opening, February 3rd, but there may have been some other entertainment or refreshments served at the opening of other bands.

Q. Can you give me any further breakdown of what the item of \$2,602.24, Entertainment and Gifts, consisted of, other than what you have said?

A. Not from memory, sir.

Q. All you saw was the check written for gifts and entertainment, and you accepted them as such?

A. Many of them were substantiated by vouchers.

(Testimony of Jack Marvin Ostrow)

Q. Were most of the checks drawn to cash or to individuals? A. Cash.

Q. And no vouchers shown for it?

A. Not in most instances, sir, no.

Mr. Doherty: Your Honor, it is very difficult to examine a fine, experienced auditor on just a few minutes' preparation.

The Court: I do not want you to feel limited, Major. Take all of the time that you need.

Mr. Doherty: But there is a limit to every one's patience.

The Court: We are all patient here. The jury looks very [838] patient, and I am feeling entirely composed, so you take all the time that you think necessary.

Mr. Doherty: I would suggest, if I might, your Honor, that I don't know what information I may get from our accountants in the meantime, and I wonder if I could call Mr. Hansen a little out of order and I could get some preliminary work done with him. I see we have just about fifteen minutes left, and then Mr. Ostrow could return at 2:00 o'clock. I am only suggesting that as a matter of expediting the examination.

The Court: Very well.

Mr. Christensen: Would you mind if I asked just one question now, or would you rather that I defer it?

The Court: I think you had better defer the re-direct examination until Major Doherty finishes with his cross-examination.

Mr. Christensen: Very well.

The Court: You may leave the stand.

Mr. Doherty: Mr. Hansen.

EUGENE A. HANSEN,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

The Clerk: You have been sworn? [839]

The Witness: Yes.

By Mr. Doherty:

Q. Where is your office, Mr. Hansen?

A. San Diego.

Q. How long have you been in business there?

A. I have been there since '37.

Q. You are a public accountant? A. Yes.

Q. I don't mean to infer by that that a public accountant isn't just as capable as a certified public accountant.

You have your own office there? A. Yes.

Q. When did you go to work for Mr. Finley?

A. Sometime in the month of August.

Q. 1944?

A. Yes. The exact date I don't know, but I did render the August statements.

Q. What type of work did you do for him in connection with the Mission Beach enterprise?

A. A monthly audit and prepared financial statements.

Q. How much time did you spend over there?

A. Oh, approximately about eight days a month.

Q. Would you go personally? A. Yes.

Q. Would you take your assistant along? [840]

A. At times I did, and at times I didn't.

Q. You took over on the job where Astrow left off?

A. Yes.

(Testimony of Eugene A. Hansen)

Q. And you followed the same method of setting the matter up that he did? A. Yes.

Q. Would you look at this Exhibit 12-F. I think that has been prepared by you. Is that correct? (Handing document to witness.) A. Yes.

Q. Turn to B-2, which is the third sheet of that.

A. That is Exhibit B-2.

Q. It is Exhibit B-2, but we refer to the exhibits as the court numbers here, which in this case is 12-F. You have an item there of \$1,249.85 as the expenses of this law suit. You have charged that against the ballroom operations, have you? A. Yes.

Q. I will give you some composite numbers here. Tell me what schedule the park manager is on, or the executive salaries.

A. Well, for the month of December they have no park manager.

Q. Well, the executives.

A. Well, just a minute. [841]

Q. Is that B-5? I think it is B-5. A. Yes.

Q. It says, "Salaries, Executive, December, 1945, \$1,000.00." A. That's right.

Q. Who got that? A. Warner Austin.

Q. Mr. Wayne Austin? A. Warner Austin.

Q. Who? A. Warner Austin.

Q. How long had he been drawing that salary, according to your records?

A. I think Mr. Austin came back in the month of September. I am not sure, but I think it was.

Q. What were his duties, according to the record that you examined there? A. As manager.

(Testimony of Eugene A. Hansen)

Q. General manager?

A. I wouldn't say manager. He was manager of the park.

Q. Manager— A. Or of the ballroom.

Q. Was he manager of the park or the ballroom?

A. No, he wasn't manager of the park. He was manager [842] of the ballroom. He took care of the bookings, and so forth.

Q. He took charge of the bookings?

A. Well, I wouldn't say took charge of it, but he followed it through.

Q. That was his job, then, in the ballroom, to follow through the bookings of the bands and the entertainment for the ballroom?

A. That's right. That is my idea of it, yes.

Q. That is what the records show? You are only testifying from the records, are you not, Mr. Hansen?

A. Yes. If you want to put that in the category of a manager, I would say yes; if that is the duties of a manager. He also supervised the office force.

Q. Well, I am only asking you, and all you can testify to, as an accountant, is what the records show.

A. That's right, he was a manager.

Q. He was manager? A. That's right.

Q. And the records there show that a part of his duties as manager was supervising the office force?

A. Yes.

Q. Also following through in the booking of bands and the entertainment for the ballroom?

A. The records don't show that, no. That is conversations [843] I have heard he have over the telephones

(Testimony of Eugene A. Hansen)

while I was in the office performing my duties, and that is my own opinion.

Q. In other words, you being around several days each month, in the same office that he was, you saw the duties that he was performing? A. Yes.

Q. And heard the telephone conversations, and from that you made the statement that he was in charge of the jobs you just told me? A. That's right.

Q. Now, Schedule B-1 of this same exhibit shows an item of \$12,135.59 as traveling expenses. Is that correct?

A. For the year to date, yes.

Q. Pardon?

A. For the year to date, yes, up to December 31st.

Q. That was only from March 1st?

A. That's right.

Q. It wasn't for the year, just from March 1st?

A. Yes. They are on a fiscal year accounting basis.

Q. In the fiscal year? A. Yes.

Q. But it is only ten months of the fiscal year?

A. That's right.

Q. Who spent that money in traveling expenses, if the records show? [844]

A. Well, as far as I can go back, Mr. Finley.

Q. In that same schedule you show at the top of the expense column, salaries and bands, \$137,225.87?

A. Yes, sir.

Q. That is for ten months? A. Yes, sir.

Q. Then you have another item of \$6,325.00, stage show fees. Is that right? A. Yes.

(Testimony of Eugene A. Hansen)

Q. Those were stage shows in connection with the ballroom operation?

A. Well, I think you will find that that \$6,325.00 occurred prior to August 1st, the biggest portion of it.

Q. But it was for stage show fees?

A. That is my understanding, yes.

Q. That was for entertainment in connection with the ballroom? A. Yes.

Q. You have an item there of Miscellaneous. I am not going into it. You don't know what the miscellaneous items consist of, do you? A. Not right offhand, no.

Q. So I am not going to take up your time on that. To boil it down here, according to your statement of December 31st, they lost \$103,523.87 in the ballroom operations? [845] A. Are you reading that from—

Q. The first sheet? A. The first sheet, yes.

Q. Is that right? A. That's right.

Q. And they made a profit of \$74,875.92 from the concessions? A. That's right.

Q. Is that correct?

A. Yes. The way the books are set up, yes.

Q. Which made a net loss of about \$28,500.00.—

A. Somewheres around there.

Q. —for the entire operation?

A. Yes, for the ten months.

Q. During that period? A. Yes.

Q. Would you during the noon recess, if I won't impose on you, sit down with Mr. Ostrów and give me these items, so that we will get them all together? You might make a note of them, because it will save us a lot

(Testimony of Eugene A. Hansen)

of time. I want the composite total income for the 12 months period of the ballroom and the concessions.

A. From January 1st, 1945 to December 31st?

Q. Yes, that will give us the 12 months. The total amount paid out for all purposes, all expenditures chargeable [846] against the ballroom and the concessions.

A. You don't want it split? You just want the total income from the park. Is that the way I understand it?

Q. The total income from the park, that is, from the entire operation. A. Yes.

Q. And the total expenditures. That is one group.

No. 2 group: Income for the 12 months from the ballroom; income for the 12 months from the concessions; expenditures for the 12 months from the ballroom; expenditures for the 12 months for the concessions. Do you follow me? A. I follow you.

Mr. Doherty: Now, next, and you had better make a note of this one, the amount paid out for the ballroom for bands and entertainment fees for the 12 months, and the amount paid out in salaries of all types chargeable to the ballroom, for the 12 months; and the amount paid out in the way of publicity, that is, newspaper, radio, posters, publicity men, outside fees, and all these other, for the 12-months period.

The Witness: Chargeable to the ballroom?

Mr. Doherty: Chargeable to the ballroom, yes.

The Court: We will take our recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

(Whereupon, at 11:55 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [847]

Los Angeles, California, Wednesday, February 6, 1946.
2:00 p. m.

The Court: All present. Proceed.

Mr. Doherty: Mr. Hansen.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff,
having been previously duly sworn, was recalled and
testified further as follows:

Further Cross-Examination

By Mr. Doherty:

Q. Mr. Hansen, just at the noon recess I asked you
and the other gentleman to assemble some data for me.
Were you successful in getting it for me?

A. We were, the largest portion of it. I think there
is one. Mr. Ostrow has the work sheets there that we
drew up.

Q. He has the work sheets?

A. Yes; he has them there now.

Q. Have you agreed between yourselves as to whether
you should present that or Mr. Ostrow?

Mr. Ostrow: It doesn't matter. It is quite all right.

The Witness: No; we were just going to submit to
to you.

Mr. Doherty: I mean whichever is the most agree-
able between you and Mr. Ostrow, it would be agreeable
to me who [848] should present it.

The Witness: It is immaterial to me. It doesn't
make any difference.

(Testimony of Eugene A. Hansen)

Q. The first item—I am only recalling from memory—was the total income from the joint operation of Mission Beach for the 12-month period.

A. \$374,824.43.

Q. And the total expenditures?

A. You mean the total expenditures on the ballroom or on the whole thing?

Q. You gave me the consolidated here, the \$374,000, in round numbers, refers, I believe, to the total income for 12 months for both operations.

A. That is the concessions and the ballroom and the checkroom.

Q. Is that correct?

A. That is all the income. That is the total income; yes.

Q. Give me the total expenditures for the joint operations? A. We did not work that up.

Q. You did not get that?

A. That is one of the schedules that we did not get to; no.

Q. That is one of the items you did not get to. Can [849] you give me the breakdown for the ballroom income? A. The ballroom income—

Q. For 12 months. A. —was \$192,155.09.

Q. \$192,552? A. No; \$192,155.09.

Q. Now, can you give me the ballroom gross expenditures?

A. The gross expenditures, before depreciation and advertising publicity, was 208—

Q. No. I want everything.

A. You want all of it?

(Testimony of Eugene A. Hansen)

Q. The joint; the total expenditures that you charged against the ballroom, including depreciation.

A. All right. Just a moment, please. \$278,389.52.

Q. Now, give me the same information for the concessions. That would be the total income and the total expenditures.

A. As I said before, we didn't have the total expenditures on the ballroom. Mr. Ostrow is working on that right now. I mean on the—

Q. You mean on the concessions?

A. On the concessions, yes; that is right.

Q. You haven't got that yet. You stated on your examination this morning respecting Mr. Warner Austin that you thought he was in the service a period.

Mr. Christensen, for the purpose of simplifying the [850] examination, could we stipulate as to the date he went into the service and the date he was discharged?

Mr. Christensen: Pardon me a minute.

Mr. Doherty: Can you give me an approximation?

Mr. Christensen: He was in the service for about five months, Mr. Doherty.

Mr. Doherty: May we agree on that? Is that correct?

Mr. Christensen: About five months; that is correct.

Mr. Doherty: It is agreed that he was in for about five months, and that would be from about April to September, understanding this, that you may call him and if he gives us the exact dates, then the record may be corrected, with his Honor's permission, as to the correct dates.

(Testimony of Eugene A. Hansen)

Mr. Christensen: You state whatever time you want and I will call him, and then we can correct it, Mr. Doherty.

Mr. Doherty: Five months would be April, May, June, July, August.

The Plaintiff: Do you remember when Mr. Austin came back?

Mr. Doherty: We are trying to arrive at a date to save some time. Probably we are losing time by doing it.

The Court: Apparently you are not making very much progress. Maybe you can have your conference outside of the courtroom.

Mr. Doherty: All right, your Honor. Now, have the [851] accountants brought in the books yet? I think, your Honor, it would be a more orderly examination when the books are in the courtroom, for me to examine Mr. Ostrow first.

The Court: Very well.

Mr. Doherty: And, for the purpose of the examination, on Mr. Warner Austin I will agree that he was in the service for approximately five months, and that would be from April to August, inclusive, for the purpose of our discussion, subject to change as to the correct time if the dates are inaccurate.

Mr. Christensen: That is agreed.

The Court: Satisfactory. [852]

The Court: Mr. Hansen, you will not leave the courtroom?

The Witness: No.

Mr. Doherty: Mr. Ostrow.

JACK MARVIN OSTROW,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

Mr. Doherty: They have handed me a suitcase. Would you pick out of there the necessary books, Mr. Ostrow, respecting the expenditures?

The Court: I want the record to show that a receptacle has been presented that contains a number of records and books. What are they, Mr. Ostrow?

The Witness: This particular one that I have picked out?

The Court: No, the entire set that is contained in the suitcase.

The Witness: Well, there is one that is known as the general ledger, and the general records, consisting of the cash receipts, journal, the check record, the invoice record and the general journal; a subsidiary detail on the number of tickets sold, for federal tax and city ticket tax purposes. The original receipt books, primarily used in giving the [853] receipts to the concessions for their payments of rental; and the cashiers' recaps on the night's receipts from the ballroom operations.

Mr. Christensen: Your Honor, to complete it, of the Mission Beach operation?

The Court: What entity are those the books of?

The Witness: This is both for the Mission Beach Ballroom and for the Amusement Park.

Q. By Mr. Doherty: They are just one set of books?

A. They are one physical set of books, yes.

(Testimony of Jack Marvin Ostrow)

Q. All right. Sit down. Take the proper book which will show the expenditures on given dates. I want you to turn to February 18th as the first item. My attention is called to check No. 42, Shalimar Cafe, \$902.00, charged to publicity and advertising. Can you tell me what that was for?

A. Well, without having the invoice before me, I would say offhand that that is the amount I spoke of this morning regarding the opening catered affair. The owner of the Shalimar Cafe catered it, and I believe that was February 3rd, and this was February 18th. It was paid within the following few weeks.

Q. Now, February 18, check No. 43, drawn to Larry Finley and Associates, \$464.95. What is that?

A. Again, I don't have the invoice in front of me, but [854] from memory I would say that that item represents a reimbursement for expenditures in advertising incurred by Larry Finley and Associates through another bank account he had in the Bank of America Building, down on Broadway. He was using another bank account before they opened the Mission Beach account.

Q. Are you reasonably sure there was an invoice in detail for that?

A. Yes, I am reasonably sure. This has been quite some time since I performed the audit, but I am reasonably sure there was a detail on that amount.

Q. Now, June 16th, check No. 869, Mission Liquor Company, \$203.50. What was that for?

A. Well, from the name to whom the item was paid, it was a part of the entertainment at the various band openings in the ballroom.

(Testimony of Jack Marvin Ostrow)

Q. July 5th, check 919, Golden State Fire Display Company, \$1,000.00. What was that for?

A. I believe that the Golden State was the one from whom the fireworks display was bought, and that was the deposit on the amount of the fireworks for the July 4th celebration, I think.

Q. That is the one that you discussed this morning, that was charged to the ballroom, excepting approximately 12 per cent? [855]

A. It was charged to "Advertising—Special Events," yes.

Q. Now, turn back to May 22nd. May 22nd, check 712, Beverly Wilshire Hotel, \$268.28. Will you make a notation of these amounts because I want to ask you for a total on them. Do you find that there?

A. Yes, I see that.

Q. What was that for?

A. Well, I believe that Mr. Finley was in Los Angeles at that time. As I say, I am speaking mainly on these items now from memory. I don't have any of the vouchers before me.

Q. Then turn to June 2nd, and you will find it at the end of June, it was entered out of order, check No. 763, Beverly Hills Hotel, \$357.55. What was that?

A. It was a like item.

Q. Then June 14th, check 856, Beverly Hills Hotel, \$560.95. Do you find that there? A. Yes, sir.

Q. What was that for? A. The same thing.

Q. The same thing? A. Yes.

(Testimony of Jack Marvin Ostrow)

Q. That is, in the period from May 22nd to June 14, there was a total, according to my computation, of \$1,186.76? [856]

A. Yes. I believe during that period both Mr. and Mrs. Finley were at the Beverly Hills Hotel, as I remember it.

Q. You did not go beyond July, so I will turn back to another account. Turn to April, check No. 663. Do you have it there? A. 663?

Q. Yes, 663.

A. That is a May check, according to this.

Q. Do you find that? A. For \$3.59?

Q. No, this is a much larger sum than that. It is an account charged to general administration, I think account 550, if I am not mistaken. See if you find a \$3500.00 item in there.

A. Oh, that might possibly be a pay roll item, pay roll check No. 663.

Q. Well, you might look at that.

A. I don't believe the pay roll records are here, sir.

Q. They are not here?

A. I don't see them in there, no, sir. The pay roll distribution is not there.

Q. Well, our accountant handed me this memorandum, a check No. 663, \$3500.00, April 1-April 15?

A. Was it a pay roll item, sir? Am I correct in that? [857]

Q. It would indicate from what this shows here. It says pay roll page No. 11.

A. Yes, it was a pay roll item and, as I say, the pay roll book is not here. I don't know where it is. I haven't seen it.

(Testimony of Jack Marvin Ostrow)

Mr. Christensen: Mr. Doherty, does the accountant still have the pay roll records?

Mr. Doherty: I thought they brought in all the records.

The Court: Were the pay roll items brought in this morning?

The Witness: I couldn't say, your Honor, because they were brought in from San Diego. I presume they were. Otherwise they would not have the record of it.

The Court: That is what I gathered, that they must be here somewhere.

Mr. Doherty: I will proceed with another matter while they get that record, or the source of it, because it was handed to me about four or five minutes ago as having been taken from the record.

Q. By Mr. Doherty: Could you take these exhibits and compute a few totals for me while I am waiting for this other, and we will be covering that ground. Examine the records that you have already presented here with the audit, this last number, Exhibit 12-F, and give me the total expenditures for entertainment and gifts for 12 months. [858]

A. If you will give me the exhibit, my statement as of February 28, I will be able to do that.

(The document referred to was handed to the witness.)

There was \$6,680.82. \$807.80 through February 28th and \$5,873.02 from March 1, 1945, through December 31, 1945.

(Testimony of Jack Marvin Ostrow)

Q. Now, give me the same information covering the same period for traveling expenses.

A. That would be \$12,736.77. \$601.18 through February 28, and \$12,135.59 from March 1st through December 31st of 1945.

Q. Give me the totals for expenses, advertising and publicity to the ballroom for the same period, that is, for the 12-months period.

A. That would be \$66,167.02. \$13,106.74 through February 28, 1945, and \$53,060.28 from March 1st through December 31, 1945.

Q. Now, let's discuss that a minute. The total amount for those periods for expenses, advertising and so forth, those items I called for, was \$80,842.02, was is not? [859]

A. What was that figure you just gave me, Mr. Doherty?

Q. Just look at your figures and see if I do not have that correct. For the first two months, \$14,156.74 was the total expenditures for advertising for the enterprise?

A. That is correct.

Q. And for the next ten months, \$66,685.28 was spent for the total enterprise?

A. That is correct.

Q. Making a total of \$80,842.02?

A. That is correct.

Q. Of which you charged against the concessions, or, rather, you received from the concessionaires \$14,675, giving you a figure of approximately \$66,000 in advertising and publicity charged to the ballroom?

A. That is correct.

(Testimony of Jack Marvin Ostrow)

Q. I have just been told that the information I was asking you for came from the payroll check record. Have you got that record here?

A. No; I do not believe that that one is here.

The Court: Did you examine the suitcase before you looked at it here today in court?

The Witness: No; I did not, your Honor.

Mr. Doherty: I will take the two more items and then I will be through on this matter.

Q. Look at that exhibit upon your left, right here in [860] front of you; 12-F is it? A. Yes, sir.

Q. Give me the total amount of income from the ball-room as of March 1, 1945 to December 31. That is in Schedule B-1, is that right? A. That is right.

Q. That is \$173,803.61? A. That is right.

Q. And how much was paid out during that period for bands?

A. As per the statement here, \$137,225.87.

Q. Could you tell me what 60 per cent of \$173,000 would be, just in round numbers?

A. Oh, roughly, about \$102,000.

Q. In other words, 60 per cent, if that was paid the bands, the total would be \$102,000, but instead of that, \$137,000 was paid out in bands? A. That is right.

Q. Now take the same information respecting the first two months, January and February.

May I ask Mr. Ralston to come forward and pick up the book from which he gave me the information, your Honor?

The Court: Yes.

(Testimony of Jack Marvin Ostrow)

The Witness: I am sorry, your Honor. I was mistaken. They have transferred them from the binders that they usually [861] kept them in, and they had them in the front of this book.

The Court: Very well.

Q. By Mr. Doherty: Now look at payroll page No. 11, check No. 663, 4-1 to 4-15, that is April 1st to April 15th, 1945, for an item of \$3,500. Do you find it there?

A. Yes, sir.

Q. To whom was that paid?

A. To Mr. Warner Austin.

Q. For what purpose does the record show?

A. Well, I believe it was charged to executive salaries, if I remember the accounts properly. It is charged to 550.02 which is the index number, and I will tell you in a moment what 550.02 is. That is to general administrative expenses, executive salaries.

Q. Does it say for what period of time?

A. That, I believe, was from the first of January through three and one-half months. There was a period of time there that Mr. Austin did not draw any actual salary, and about the time when he was contemplating leaving for the service, or so forth, they paid him for his services to that date.

Q. Did you make an investigation to determine whether or not he had worked during that period?

A. Yes. Yes; he had performed services, from the word of Mr. Finley and the various people in the office around [862] there.

(Testimony of Jack Marvin Ostrow)

Q. Does the record indicate what type of service he performed those three and one-half months?

A. Well, the accounting records do not indicate the type of service performed. They just indicate the amounts paid for expenses of some sort.

Q. Do you find any record there in your investigation where any other employe or executive of Mr. Finley's was not paid for three and one-half months?

A. No; there was not.

Q. That is the only instance where you find anyone's salary was delayed in its payment for three and one-half months and paid all at one time?

A. Yes, sir.

Q. And that was at the rate of \$1,000 a month, was it not?

A. Yes, sir.

Q. Turn to payroll page No. 15, check No. 821. Do you find it?

A. Yes, sir.

Q. And what do you find?

A. A check to Mr. Warner Austin for \$500.00.

Q. For what period of time?

A. Well, I presume it is the payroll of the 1st of May; that it would be for the period for the month of April, [863] or half a month. I don't remember at that time.

Q. Doesn't it show there from May 1st to May 15th?

A. To May 15th. I am sorry. I was not reading the—

Q. Is that right?

A. That is right, sir.

Q. That was charged there to publicity and advertising, wasn't it?

A. Yes, sir.

Q. And not to executive salary?

A. Yes; it was.

(Testimony of Jack Marvin Ostrow)

Q. Take the next one, payroll page 18, check No. 945. Tell me what you find there.

A. A check to Mr. Warner Austin for—well, a gross of \$250.00.

Q. And what date was that for?

A. May 16th to 31st, inclusive.

Q. And what account was that charged to?

A. Salaries-advertising.

Q. Was it publicity and advertising?

A. Publicity and advertising; yes, sir.

Q. The next check, payroll page 22, check No. 1071, what was that for?

A. That was to Warner Austin for \$250.00 from the 1st to the 15th of June, charged to salaries, publicity and advertising. [864]

Q. The next check, payroll page 25, check No. 1187; give me the amount of the check and to whom payable, the period which it covered and the account to which it was charged?

A. It was another check to Mr. Warner Austin for \$250.00 gross, and covering the latter half of the month of June, the 16th through the 30th, charged to salaries, publicity and advertising.

Q. Check No. 1218 on payroll page 26?

A. A similar item to Mr. Warner Austin?

Q. The identical item, wasn't it, \$250.00?

A. \$250.00; yes, sir. I am sorry.

Q. And to Warner Austin?

A. That is right; for the period July 1st to 15th, charged to salaries, publicity and advertising.

(Testimony of Jack Marvin Ostrow)

Q. And then payroll page 29, check No. 1345?

A. An identical item; Mr. Warner Austin for the period the 15th to the 31st of July, charged to publicity and advertising.

Q. Now, that is as far as you acted as accountant there, wasn't it, up to July 31st?

A. That is right.

Q. When you noticed these items did you make any check respecting the services being rendered by Mr. Austin during that period? [865]

A. Yes; I questioned that.

Q. And what did you ascertain?

A. I ascertained that he was being paid half his regular salary while he was on service to the Armed Forces.

Q. Half his salary? A. That is right.

Q. And that was charged to publicity and advertising?

A. Well, the reason it was charged there was that the month prior to the period he left he had started by doing the public relations, publicity and advertising in San Diego, and the last month before he left was also charged to publicity and advertising.

Q. How does the record show that he rendered any services to the company during that period?

A. During the period he was in service?

Q. Yes.

A. Well, the records, as I say, the accounting records do not indicate the services rendered. I can say, however, that I met him in uniform down there on several trips to San Diego at the park.

(Testimony of Jack Marvin Ostrow)

Q. You saw him there?

A. Yes; I saw him there when he was in from Camp Roberts.

Q. Now, keep on the books. You can look at these books and save me some time. Payroll page 31, check No. 1370; tell us what you find respecting that? [866]

A. What was that number, sir? 13—

Q. Check No. 1370.

A. It was a check to Mr. Warner Austin for \$250.00 gross, from August 1st to August 15th, chargeable, I believe, the same way, to publicity and advertising salaries.

Q. Payroll page 33, check No. 1448?

A. It was a similar check to Mr. Warner Austin for \$250.00 gross, covered August 15th through the 31st, chargeable to publicity and advertising salary.

Q. Payroll page 36, check No. 1541; tell us what you find respecting that?

A. Is a check to Mr. Warner Austin for \$250.00 gross for the period from September 1st to September 15th, chargeable to publicity and advertising salaries.

Q. Check No. 1595, page 38 of payroll records?

A. A check to Mr. Warner Austin for a gross of \$250.00 for the period September 16th through September 30th, chargeable to publicity and advertising salaries.

Q. Payroll record No. 41, page 41, check No. 1683?

A. Is a check to Mr. Warner Austin for \$500.00 gross for the period October 1st through October 15, 1945, chargeable to publicity and advertising salaries.

Q. Was there another item there of \$150.00?

A. Yes; it seems to be an item above it. Yes, sir.

(Testimony of Jack Marvin Ostrow)

Q. And who got that money? [867]

A. Also Mr. Warner Austin.

Q. Mr. Warner Austin. He got \$650.00 at that time?

A. Yes, sir.

Q. The next check, No. 1782, October the 15th to November 1st?

A. 1782 was a check to Mr. Warner Austin for \$500.00 gross for the period October 16th through October 31st, 1945, chargeable to the same account, publicity and advertising salaries.

Q. Check No. 1849, payroll record page 45?

A. A check to Mr. Warner Austin for \$500.00 gross for the period November 1st to November 15th, 1945, chargeable to publicity and advertising salaries.

Q. Payroll page 46, check 1914?

A. A check to Mr. Warner Austin for \$500.00 gross for the period November 16th through November 30th, 1945, chargeable to publicity and advertising salaries.

Q. That was charged, I think, to general administration, wasn't it, executive?

A. Was it? As you remember, Mr. Doherty, I am just reading these.

Q. I know that, Mr. Ostrow. I did not want you to unconsciously make an error.

A. Yes; it was charged—I am sorry—it was charged to executive salaries, general administrative expense. Yes. [868] sir. I believe I may have made the same error before, though, Mr. Doherty. I would not be surprised if I made the same error on the one before that as far as the distribution. I believe it might have been charged to general administrative executive salaries.

(Testimony of Jack Marvin Ostrow)

Q. My records show here, the memorandum I have, that was a check of September—I will go back. That the first check of \$3,500 was charged to general administration-executive salaries; and then all the other checks up to and including September the 30th were charged to publicity and advertising; and all checks beginning October the 1st, 1945 to and including December the 31st were charged to general administration-executive salaries.

A. That would probably be right.

Q. And if you have mis-spoken yourself—

A. I believe I called the last few, from October, as publicity and advertising in error. Yes; I believe I have.

Q. Now, take the last one I gave you, which was 1914, from November the 16th to December the 1st, I believe.

A. Yes, sir.

Q. And that was general administration-executive salaries?

A. Yes, sir.

Q. Now, take the next check, 1976?

A. That was to Mr. Warner Austin for \$500.00 for the period December 1st through December 15th, 1945, chargeable [869] to general administrative-executive salaries.

Q. Check No. 2, payroll page 50?

A. That was a check to Mr. Warner Austin for the period December 16th through December 31st, 1945, for \$500.00 gross, chargeable to general administrative-executive salaries.

Q. Turn to check 1119 on September the 6th.

A. Payroll or ordinary check, sir?

Q. Ordinary check.

A. On what date was that, sir?

(Testimony of Jack Marvin Ostrow)

Q. Check 1119. A. Check on September 6th?

Q. September the 6th, check 1119, \$100.00?

A. Yes, sir.

Q. What was that for?

A. Well, all I can do at that date is read the entry here, since I did not do the audit; but it says "Cash, journal passes."

Q. You do not know what that means?

A. Well, I think I do, because I believe it started before I started the auditing. They had an arrangement with the San Diego Journal, which is a local San Diego paper, known, I think, as "The Fun Book Reporter," by which they gave out to certain individuals passes for reduced price for the various concessions and at the ball-room, and through some reciprocal arrangement they paid The Journal for some of the—or they [870] paid out the concessionaires for the cost at the reduced price of these tickets, to redeem these tickets.

Q. While you are on that date or near that date, turn to September the 4th, check 1111? A. Yes, sir.

Q. And to whom was that made payable?

A. Wilma Gowns Company.

Q. In what place? A. Of what place, sir?

Q. Does it say what city?

A. No; not the check record doesn't say, sir.

Q. Do you know where the Wilma Gowns Company is located? A. I do not know.

Q. How much was the check? A. \$135.60.

Q. And what was that charged to?

A. To publicity and advertising-miscellaneous.

Q. And you were not auditing at that time, were you?

A. No; I was not.

(Testimony of Jack Marvin Ostrow)

Q. Go back to August 25th, check 1098?

A. Yes, sir.

Q. To whom was that payable? A. Glen Gray.

Q. How much was it? [871] A. \$227.53.

Q. What is that charged to?

A. Publicity and advertising-miscellaneous.

Q. And who is Glen Gray?

A. Glen Gray, by reputation, is a band leader.

Mr. Doherty: May I be excused half a minute?

Q. While you were auditing there did you have an account with a man named McDevitt?

A. Did I have an account?

Q. Yes, an employee with the company?

A. He was an outside agent.

Q. Do you know what his compensation was?

A. I wouldn't recall. I believe, though, it ran about \$1200.00 a month.

Q. Do you know where he was located?

A. His main office, I believe, is on Sunset and Vine, in Los Angeles.

Q. Did you examine your records as to whether or not there was a month to month arrangement or a contract for over a definite period?

A. I never did see a contract with him.

Q. You never saw a contract? A. No.

Q. In other words, you got a bill and it was O.K.'d and you paid it? [872]

A. I didn't pay it. There was an O.K.'d invoice paid in the records; yes, and there was each one was O.K.'d.

(Testimony of Jack Marvin Ostrow)

Q. When you got an O.K.'d invoice, you checked it against the check and it went through?

A. That is right. He enumerated the services, publicity or advertising or whatever he performed.

Mr. Doherty: That is as far as I have time to check, Mr. Ostrow. So, re-direct.

Re-Direct Examination

By Mr. Christensen:

Q. Do you know who Barney McDevitt is?

A. Yes, I know Mr. McDevitt. I have met him.

Q. What is his business or occupation?

A. Well, he is a publicity man, a promotion man who has put on, I gather, quite a few successful exploitations of ballrooms and general publicity work.

Q. Will you take a look at Exhibit 12-C—no; I beg your pardon. The one as of September, 1945? [873]

A. September, sir.

Mr. Christensen: Yes. Let me see here.

Mr. Doherty: I think it is Exhibit 12-F.

Mr. Christensen: Let me see the different ones. I didn't have them here.

The Clerk: 12-D.

Q. By Mr. Christensen: Let me withdraw the question pending and let me invite your attention to Exhibit 12-A here, in which there is an item I want to ask you about. On Schedule B-1 of Exhibit 12-A there is an item here under expenses which says, "Entertainment Fees, \$7,100.00." Do you know what that was for?

A. Yes, I can recall the nature of the item was the individual acts hired in addition to the bands to appear at the ballroom. I believe this was the period up to

(Testimony of Jack Marvin Ostrow)

February 28, and I remember, for example, for the opening they had Allan Jones and Ella Mae Morse there in addition to, I think, the Henry Busse band, which opened the ballroom.

Mr. Doherty: I will stipulate, Mr. Christensen, that the entertainment fees, \$7,100.00, was a part of the entertainment there in the form of acts. I mean I only referred to that as a cost of the show.

Mr. Christensen: I see. I didn't want any misunderstanding about that.

Mr. Doherty: No, no. It is right under the bands. The [874] bands are above it, and then this item is immediately under the bands.

Mr. Christensen: Yes.

Q. By Mr. Christensen: Do you happen to know what the account was with Wilma Gowns?

A. No. That was a period subsequent to my engagement.

Mr. Christensen: That is all I wanted to ask you, sir.

Re-Cross Examination

By Mr. Doherty:

Q. There is one other item I do want to call your attention to while you are on the stand that I overlooked.

A. Yes, sir.

Q. June 14th, check No. 854. A. Yes, sir.

Q. What was that check for, and in what amount?

A. It is written for \$1,000.00, rent of Larry Finley while in Los Angeles.

Q. Did you investigate what the rent consisted of?

A. I don't follow that.

(Testimony of Jack Marvin Ostrow)

Q. I mean, what item of rent was it for, for Mr. Finley, while in Los Angeles, \$1,000.00?

A. He rented a home here for several months.

Q. He had a home here?

A. Well, a place to live, for his wife and family, yes.

Q. That was in June, of 1945? [875]

A. That is when he paid the check, yes, sir.

Q. And for what period of time was the rent?

A. I believe it was for either June and July, or July and August, or something of that nature; covered several months, though.

Q. Don't your records show?

A. No. It was charged directly to the traveling expenses, without a breakdown of the rental period. The supporting vouchers would show the period.

Q. Would it show to whom the rent was payable?

A. It does not here.

Q. To whom was the check made?

A. That is the error in the books. It does not show the payee. It just gives the explanation. I imagine the check would have the payee on it.

Q. It just says, "Rent of Larry Finley,"—

A. Yes, sir.

Q. —\$1,000.00? A. Yes, sir.

Q. June 14, 1945? A. Yes, sir.

Q. You were auditing at that time, were you not?

A. Yes, sir.

Q. And Mr. Finley had a home in San Diego?

A. Yes, he owned a residence in San Diego at the time. [876]

(Testimony of Jack Marvin Ostrow)

Q. At that time he was connected with the Casino Gardens, and you knew that, didn't you?

A. I don't believe he was at that time, no. I don't know when he started at the Casino Gardens. I didn't take care of the Casino Gardens venture.

Q. You wouldn't say he was connected with the Casino Gardens, then, during June, July and August of 1945?

A. I really couldn't say when he started Casino Gardens. I don't know, sir.

Q. To what account was the \$1,000.00 charged?

A. Traveling expenses, I believe. Yes, it was charged to traveling expenses.

Q. Did you verify the voucher on that that justified you in charging the traveling expenses with a check to Mr. Finley for \$1,000.00 for rent while he was in Los Angeles?

Mr. Christensen: You didn't mean to say "To Mr. Finley", did you, Mr. Doherty?

Mr. Doherty: Well, the record of the ledger says, "Rent of Larry Finley while in Los Angeles."

Q. By Mr. Doherty: It was payable to cash, wasn't it?

A. No, I don't believe it was payable to cash. I don't remember who the payee was. I remember making the bank reconciliation, and seeing the voucher, and asking about it, and I received an explanation at the time from the people involved as to its nature. [877]

The Court: Are those canceled checks here?

The Witness: They are not in this valise. I don't know.

(Testimony of Jack Marvin Ostrow)

Q. By Mr. Doherty: Did you make any computation during the month of May or June to see whether any of these hotel bills at the Beverly Hills Hotel and Beverly Wilshire Hotel were charged to the Casino Gardens operation?

A. I had no way of knowing anything about the Casino Gardens operation, sir.

Q. All you know is that invoices came in from the Beverly Hills Hotel and the Beverly Wilshire Hotel in the amounts I have asked about and that checks were issued in the amounts of the invoices? A. Yes, sir.

Q. I will ask you about one more thing, and it will save Mr. Hansen considerable time. Turn to your ordinary expenditure ledger for September 4th. Have you it there? A. Yes, sir.

Q. Check No. 1154, the amount of the check, and to whom payable?

A. It is a check for \$300.00, payable to cash.

Q. No. 1155, the same date.

A. It is in the amount of \$160.76, chargeable to the Waldorf-Astoria.

Q. No. 1156, the same date.

A. A check for \$400.00, payable to cash. [878]

Q. So that on that date there were two checks to cash for \$700.00, and one to the Waldorf-Astoria for \$160.76; is that right?

A. That is what the records show, yes, sir.

Q. To what account were they charged, these three checks? A. Traveling expenses.

Mr. Doherty: I think that is all.

I will call Mr. Hanson for just a couple of questions and see if he has his computation complete yet.

EUGENE A. HANSEN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Doherty:

Q. Have you completed that computation, Mr. Hansen?

A. No, I was leaving it up to Mr. Ostrow to complete. He had started working on it, so I was going to leave it to him to complete.

Mr. Doherty: May I ask the court's indulgence to state that if we have a chance to get the books back and check some more items, then if it is necessary to call Mr. Hansen and Mr. Ostrow, we will not delay the case. In the meantime we can be moving along. Then I could recall them and ask them [879] about certain items, if necessary. I do not want to impose on the court's time. The noon hour is a very brief time in which to examine books.

The Court: Do you have other witnesses, Mr. Christensen.

Mr. Christensen: No, I had not planned on it. You want to finish your cross-examination of Mr. Finley, don't you, Mr. Doherty?

Mr. Doherty: I think the auditors have covered it, Mr. Christensen. I think the auditors have covered what I would ask Mr. Finley.

Mr. Christensen: All right.

Mr. Doherty: In other words, the books are the best evidence.

(Testimony of Eugene A. Hansen)

Re-Direct Examination

By Mr. Christensen:

Q. Let me ask you one question. Do you know about the Wilma Gowns account, the charge?

A. Not right offhand. When was that check drawn, that Wilma Gowns check?

Mr. Doherty: The check, Mr. Hansen, if I may interrupt, was No. 1111, September 4, 1945, Wilma Gowns Co. My notation says, "New York, \$135.60."

The Witness: That may have been in connection with the Miss America contest. I think it was.

Mr. Doherty: You have no independent knowledge of it? [880]

The Witness: Well, not independently, no, but I do know, just from memory, that there was an individual from San Diego in the contest, sponsored by Mr. Finley, and she went back to the East to participate in the contest back there, after winning the preliminaries in San Diego.

Mr. Doherty: That may be corroborated, Mr. Hansen. To refresh your memory, I just read off some checks indicating that Mr. Finley was in New York at the Waldorf on September 4th, because check No. 1155, which I have just read off to Mr. Ostrow, for \$160.76 was to the Waldorf-Astoria, and there were two checks to Mr. Finley on the same date totaling \$700.00, on September 4th, and this Wilma Gowns Company check is also September 4, 1945.

The Witness: Well, I think if we had the invoices you would find that was in connection with the Miss America contest.

(Testimony of Eugene A. Hansen)

Mr. Doherty: I don't know. I am just inquiring.

The Witness: Yes.

Q. By Mr. Christensen: You recall that they had a contest there in the ballroom to pick Miss San Diego?

A. Oh, yes. Miss Phyllis Mathis was the winner of the contest out there, and she went back East.

Q. And the prize was the sponsorship in the Miss America contest? A. That's right. [881]

Q. Incidentally, she came in second in the United States? A. That's right.

Q. A part of the prize offered was three gowns, wasn't it?

A. Yes. I recollect hearing talk in the office concerning that, what the prizes would be, but I didn't see anything in writing, or anything like that. It was just conversation among those down there. That was in the office down there, that that was a part of the prize that she won.

Mr. Doherty: It is time for a recess, I believe.

Mr. Christensen: Yes.

The Court: We will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition and keep its terms inviolate.

(A recess was taken.)

The Court: The record shows that the court convenes without the jury being present, and they are all without the presence of the court, and, also, that the manner of convening is at the request of counsel for the plaintiff.

(Thereupon the following proceedings were had outside the hearing and presence of the jury:)

Mr. Christensen: That is correct, your Honor, and it is for the purpose of, and I now move the court to permit me to file an amended complaint in this matter, the amendment being [882] solely to conform to the proof, and to show the parties plaintiff as being Larry Finley and Miriam Finley. The only new allegations are the fact of the partnership and the compliance with the provisions of the Code relative to publication. It presents no new issue, and I believe that it should be done by reason of the evidence given by Mr. Finley.

The Court: Let me see it.

(The document referred to was handed to the court.)

Mr. Christensen: I have heretofore given counsel for the defendants copies of the complaint, and have filed one with the clerk and one with the court. [883]

The Court: This document that is proffered here, there is no jurat. There is a seal on it. There is no verification of it.

Mr. Christensen: Mr. Finley can verify it right now before the clerk, if he will take his verification.

The Court: What is the attitude of the defendants in the case.

Mr. Collins: If the court please, the attitude of the defendants is to resist this application for the filing of an amendment to the complaint, now nominating two plaintiffs in lieu of the one who previously stood as the sole plaintiff in this action.

I appreciate that there may be decision for the court's exercise of discretion in a matter of this kind in admitting new parties plaintiff; but I do submit that this is

not a case for the court to properly exercise that discretion in favor of the plaintiff.

We have here a case which was filed on March 20, 1945, in which the plaintiff, Larry Finley, under oath very emphatically declares he is the operator of the Mission Beach ballroom. Thereafter, in this case, issues were framed, pre-trial conference was had, the deposition of the plaintiff was taken, interrogatories were submitted, motion for a summary judgment was made, and at no time, at any stage of the proceedings up to the point where plaintiff is about to [884] rest his case, does he come into this court and ask that another plaintiff be joined with him in this action.

This is an action in tort, if the court pleases; it is a statutory action. No right would exist in favor of this plaintiff were it not for the statute. The right is one which must be observed and must be enforced strictly in accordance with the statute.

The plaintiff, according to his own testimony and that of his accountants, knew that he had a copartner in this enterprise. It was not something which was developed since the trial or since the filing of the suit. It was something which was in existence as early, I believe, as 1940 or 1941. It was not an informal arrangement; it was a very formal one, declared, if you please, by Articles of Copartnership between this plaintiff and his wife.

So it is not a case of excusable neglect on the part of the plaintiff. On the contrary, it is a wanton disregard for his responsibilities in the premises, for he is going to the statute in a suit to enforce a tort in which he is only a partial owner. He does not, as he might possibly have done, represent to the court that he was suing on

behalf of the partnership. He states in clear, unqualified, unequivocal terms that he, Larry Finley, the plaintiff, is the operator of the Mission Beach ballroom.

I submit that it is not a case in which the court may [885] properly exercise its discretion in favor of the plaintiff.

Defendants are left, taken nigh to the point where the case goes to the defense, with the burden of the defense in going forward, and then he asks this court to include his wife as plaintiff.

As I say, it is a tort action; it is an indivisible tort; and he should have known, at his peril, who were the parties that were injured. He states that he was injured in \$1,000,000. Now, is his wife injured in the sum of another million dollars? The evidence adduced here in the case is an injury to him, to his business.

I submit that the motion should be denied, or the application.

Mr. Christensen: Your Honor, I only wanted to comment on this fact. That under our laws of California, his earnings and property would be community property, in any event. This is not somebody new, but his own wife.

I want to say this: That, to a limited extent, perhaps, the fault is mine. I had the partnership agreement. I read it, and I did believe that it constituted a partnership in the Mission Beach ballroom. The partnership agreement does not, by its terms, include that. As a matter of fact, it limits it to the business of sales promotion and as merchandizing and business counsellors and advisers.

However, I find that apparently they have set up the books [886] to show a partnership agreement. Mr. Finley is not a lawyer. He says, "Well, we did operate as

partners down there by reason of our acts and verbal understandings."

I have here, if the court would like to see it, the partnership agreement of which I have just spoken. It was entered into as of the first day of March, 1944. Yes; it says, "made and entered into this 1st day of March, 1944," and signed by both Larry Finley and his wife.

The Court: As to the allegations of the proposed amended complaint other than those relating to the parties, are they precisely and exactly the same as those in the original complaint?

Mr. Christensen: I believe that is the case. Mr. Jaffe prepared it. That was my instructions to him in preparing it, and a single reading of the complaint to me shows it is the same.

The Court: Mr. Jaffe, did you compare the original complaint with the proposed amended complaint?

Mr. Jaffe: No, your Honor, I did not, only I know that the stenographer in preparing the amended complaint copies exactly from the original complaint.

The Court: Are you able to state to the court that the allegations are precisely and identically the same, with the exception of the adding of the new party, the wife of the plaintiff, Mrs. Finley? [887]

Mr. Jaffe: On my just reading, your Honor, I would say so; yes, sir.

Mr. Christensen: I concur in that, and the difference in all of the paragraphs, except the first one, is merely grammatical, where it says, "Plaintiff is" changed to "Plaintiffs are".

The Court: Yes.

Mr. Christensen: That is right. With that single exception, I believe that the complaint is identical,—I should say those exceptions.

Mr. Doherty: I want to make one suggestion merely to correct counsel. Community property in California is not partnership property. We have a Code section which says partnership property is not community property.

Mr. Christensen: Speaking of a layman's view of it, it being their joint property, Mr. Doherty. If I mis-spoke myself, that is what I intended to say.

The Court: I do not know as the defendants are prejudiced by this proposed amendment. I do not see how they can be. Rule 15 of the Rules of Civil Procedure relating to amendments to conform to the evidence, and subsection (b) reads:

“Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised [888] in the pleadings. But amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a con-

tinuance to enable the objecting party to meet such evidence.

“(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

Aside from the question, which is not pertinent to this motion, as to the liability, if any, to either the present plaintiff or to the two proposed plaintiffs or to either of [889] the two proposed plaintiffs, I do not see how the proposed amendment can prejudice any of the defendants.

The only phase of the case that would operate in illuminating the question is the observation of the Second Circuit Court of Appeals in *Connecticut Importing Co. v. Frankfort Distilleries*, 101 Fed. (2d) 79. There, there was an action under the private right secured by the Sherman Anti-Trust Act, in which the plaintiff recovered a judgment, and there were two appeals, cross-appeals. In that case the court restricted the element of damage to the time of the filing of the complaint, and the damages were accordingly awarded. The defendant appealed on the merits and the plaintiff appealed from that portion of the court's charge that restricted the damages to those which accrued and which had been established prior to the commencement of the action. The Court of Appeals, in discussing that brief, stated:

“Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. *Frey & Son, Inc. v.*

Cudahy Packing Co., D.C., 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced. *Lawlor v. Loewe*, 235 U. S. 522-536. Here the plaintiff's damages, if any, after the commencement of the suit were [890] due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfurt products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative."

Now, in the case at bar, entirely independent of a factual question which should be submitted to the trier of facts, the evidence in the record at this time includes alleged transactions, negotiations, conversations, and activities that were explored fully in the state of the case that exists at this time. There is nothing excepting the mere question of the right to damages, and that only insofar as the point of time is concerned. That may be irrelevant under the present state of the action.

There is a good deal of doubt as to whether the amendment is necessary. The matter might be controlled by instructions, and probably will be so controlled. But as far as any prejudice to the defendants is concerned, I cannot see that [891] there is any.

It is true, there has been delay, there has been ample opportunity for the plaintiff to have apprised himself.

There were pre-trials; there was a motion for summary judgment; there were depositions extensively taken, and the matter of his information was there. But as far as prejudice as to the defendants is concerned—and that seems to be the spirit of this Rule—the spirit of the Rule is that the court should act so as to determine a litigation upon its merits, and not to project objections into the case that are not meritorious, even though they may be hyper-technical.

For those reasons, the motion to file the amended complaint will be granted.

Mr. Warne: May it be deemed that the answer filed to the original complaint may stand as the answer to the amended complaint in all particulars which make the issues presented to the court at this time?

Mr. Christensen: Yes, your Honor.

The Court: So understood.

Mr. Christensen: The only remaining allegation is that of the publication, that being a matter of public record, I assume we will not be required to present the actual certificate.

The Court: I think that Major Doherty elicited that fact in his examination, that there was a certificate filed. [892]

Mr. Doherty: I think there should be this further understanding, if the court please: You now have a partnership as plaintiff. We should have the understanding that we are not going to have any of the new parties plaintiff coming in with any new testimony.

The Court: Oh, no.

Mr. Doherty: Or any new conversations which we are not prepared to meet at this late date.

Mr. Christensen: That is understood, sir.

The Court: That was the basis of the ruling on it as announced by the court from the bench, otherwise there might have been some prejudice shown. I do not see how there could be any prejudice to the defendants.

Mr. Doherty: The only thought I had in mind, your Honor—and I am most liberal and I am not running counter to your ideas—is paragraph VIII, which is the conspiracy charge, that the defendants deprived, now, the “plaintiffs” of these things.

I have no knowledge that we could develop any new facts, but if she had been a plaintiff from the beginning, we would probably have taken her deposition and it is possible that we might have developed facts that we were not able to develop in this case. I say, it is only a possibility. I have no knowledge or any independent knowledge, and I do not know whether Mr. Warne has, but it is a clear type of case [893] of conspiracy; in other words, knowledge that Mr. Finley might have that Mr. Finley did not have respecting the procurement of name bands and their availability and things of that sort.

That is what I had in mind as a possibility of prejudice which might not exist in an ordinary action.

The Court: I do not see how that could be, Major. You went into all of these transactions very carefully and meticulously. The plaintiff was required to lay the foundation of these conversations which he did lay, and I do not see how the defendants can be prejudiced. We are not going to re-open this case. One of the purposes of the ruling is to conform to the Rule which I just read, which has a purpose of terminating litigation, instead of prolonging it; and that is one of the reasons why these New Rules have been so effective in the administration of justice in the Federal Courts, instead of

adhering to the technical rules which applied prior to the New Rules of Federal Civil Procedure. We were constantly confronted with trials including litigation that took years to get out of the courts.

I do not think there is any prejudice shown to any of the defendants in the case.

Mr. Christensen: The plaintiffs rest.

Mr. Doherty: I did want to get the computation from these auditors. [894]

The Court: Yes. We had better have the jury back.

Mr. Christensen: Oh, I forgot all about that.

The Court: Bring the jury down.

Mr. Doherty: Before you do that, your Honor, are we going to be permitted to make the motion for a directed verdict, or has your Honor about concluded it on the examination of the evidence and the law that was submitted?

The Court: I am not going to announce any position until the appropriate time comes. I have a very decided view on one of the defendants in the case; but as to the others, I am not going to preclude any argument that you want to make, providing it is limited within reasonable scope. I think, probably, that as to one of the defendants, there is no case so far. I do not know what your evidence will show when you finish the examination of these auditors.

Mr. Doherty: May I ask the auditors a question? Have you gentlemen got those computations?

Mr. Ostrow: I am afraid we can't quite finish them here. I do not have them all. Can we give them to you approximately?

Mr. Doherty: May it be understood, then, your Honor, that they may file those out of order, rather than delaying the proceeding for that purpose?

The Court: Was that all you wanted to examine them about when they prepared that statement, or did you want to [895] examine them orally?

Mr. Doherty: Just file that statement; that is all I will examine them on, your Honor, and they might file that out of order and pass it in and we can have it read to the jury, very briefly. I will check it over with Mr. Christensen, and if we agree on what is in it, then it may go in without any witness being called.

The Court: I want to hear what you have to say about your motion for a directed verdict, and hear it in the absence of the jury, of course. Probably we could excuse the jury now until 10:00 o'clock tomorrow morning, and devote the rest of the session, about 35 or 40 minutes, to hearing what you have to say on your motion for a directed verdict, with the understanding that the ruling will be made at the conclusion of all the evidence in the case in chief.

Mr. Christensen: Yes, your Honor.

The Court: Very well, we will call them down and let them go home, Mr. Bailiff.

Have you any idea how much longer it will take, assuming that the case goes on with the jury?

Mr. Doherty: Mr. Warne knows that better than I do.

The Court: I just wanted to inquire because the calendar is getting a little bit crowded.

Mr. Warne: I believe we can conclude the proof of the defense certainly by Friday, that is, all evidence through [896] Friday.

Mr. Jaffe: Did you say "Friday"?

Mr. Warne: Correct.

(Further proceedings were had in the presence of the jury in the courtroom.)

The Court: The record shows that all the jurors are present, gentlemen, is that correct?

Mr. Christensen: Yes, your Honor.

Mr. Doherty: Yes, your Honor.

The Court: Ladies and gentlemen, we are going to excuse you until tomorrow morning at ten o'clock. We have some matters that we will not have the benefit of your association in in this case. Be here in the morning at ten o'clock, please, and remember the admonition in the meantime and keep its terms inviolate.

Mr. Doherty: Your Honor, may I interrupt a moment? Counsel has just called my attention to an exhibit which I did not introduce. It is very brief, and I will not even read it to the jury. Are you agreeable to its being introduced?

Mr. Christensen: Oh, yes.

The Court: It may be received and marked as one of the defendants' exhibits. What is it?

The Clerk: Defendants' Exhibit L.

The Court: Let the record show that after the court [897] announced that the jury would be excused, that this proffer came up and that the reception of that—what is the number of that, Mr. Clerk?

The Clerk: Defendants' Exhibit L, your Honor.

The Court: —was in the presence of the jury, while they were present and before they left for the jury room.

I think we have everything in the record at this time, have we?

Mr. Christensen: I believe so, your Honor.

The Court: Then you will be excused, ladies and gentlemen, until ten o'clock tomorrow morning. Remember the admonition and keep its terms inviolate.

(The document referred to was marked as Defendants' Exhibit L and was received in evidence.)

(Whereupon, the jury retired from the courtroom and further proceedings were had in their absence.)

The Court: The record shows that all the jurors are without hearing. Proceed.

Mr. Christensen: Your Honor, may I at this time move the dismissal of this action as against the defendant Stein? I do not believe I have made a case against him.

The Court: That is what I was going to say.

Mr. Christensen: The motion is granted?

The Court: Yes, Mr. Christensen. There wasn't any evidence against him at all, not a scintilla. [898]

Mr. Collins: If the court please, at this time I should like to hand up to the clerk a motion for a directed verdict in behalf of each defendant, together with a memorandum of points and authorities in support thereof.

Mr. Christensen: Have you an extra copy, Mr. Collins?

Mr. Collins: I gave one to your associate counsel.

Mr. Christensen: Thank you. [899]

The Court: I have read the motion, Mr. Collins.

Mr. Collins: Very well. I shall not undertake to repeat the formal statement of the motion. I shall address myself, if the court please, to the three or four main points on which we, of the defense, feel that we are entitled to a directed verdict at this time. They are: the lack of interstate commerce in musical entertainment, the lack of any restraint of interstate commerce, and, more particularly, the lack of any unreasonable restraint of interstate commerce, the lack of proof of any conspiracy or any combination, or any type of concerted

action to restrain interstate commerce in musical entertainment or to monopolize such commerce; and the fact, affirmatively shown, that the subject-matter in which the defendants dealt, and their alleged co-conspirators dealt, was not a thing or article, or as the Code denominates, a commodity of interstate commerce, and that, therefore, there is no basis, no jurisdictional basis for this court or for any jury to award damages. And, latterly, we contend that there has been no proper evidence, demonstrable evidence, to show that the plaintiff, or, rather, these plaintiffs have been damaged in any demonstrable monetary amount as a result of any combination, conspiracy, or concerted action of any type on the part of the alleged conspirators.

Now, proceeding to the first point, that there is no interstate commerce involved in the particular aspect of the [900] case that is presented here, I do not have the boldness to assert to this court, and I disclaim any such contention, that Music Corporation of America is not engaged in interstate commerce. On the contrary, it must be conceded that it is. But I would distinguish engagement in interstate commerce on the part of an entity with restraint of interstate commerce in a commodity. I would like to have that point very clearly understood.

We admit that Music Corporation of America engages in interstate commerce, uses the instrumentalities of interstate commerce, and maintains offices in states other than this one, and it does effect, through transmittal of messages by phone, et cetera, its business with those various offices. But we do assert it does not bring any commodity within the intendment of the Sherman Anti-Trust Act, which is the subject-matter here, or which is capable of being restrained within the intendment of that law.

That leads to a consideration of Section 15 of Title XV of the United States Code, which states, in clear, explicit and plain language that the labor of a human being is not a commodity of commerce.

Now, let us consider the relationships which obtain here. We have Music Corporation of America, which in the complaint is alleged to be the personal representative and the employment agent of personnel, persons in the entertainment industry, [901] including leaders of name bands. The evidence demonstrates that Music Corporation functioned as the representative, as the counselor, as the agent, as the advisor of band leaders in the matter of the procuring of employment in dance halls and other places of entertainment.

Let us for the moment consider what would be the situation if Music Corporation was not in the picture at all. We would have a band leader negotiating directly with the operator of a ballroom with a view to having the leader and an orchestra or band perform for the dance hall or other place of entertainment. The leader could agree to work or he could refuse to work. He could stipulate certain terms as to the time he would play, as to whether he would follow another band in the town or in the ballroom. He could refuse to do all of these things. He could stipulate whatever price he would to the operator. He could charge one operator one price, and another operator another price.

Now, we introduce Music Corporation of America into the picture. What additional thing does it do? The answer is, "Nothing." It represents that leader, it functions for him and in his stead and in his behalf, and the court is familiar, I am sure, with the anti-trust cases, not cases culled from other fields of law, but anti-trust cases

which hold that when a laborer, a worker, an artisan, or a group of them, are working in self-interest and alone, they are not subject to [902] the provisions of the Sherman Anti-Trust Law, or any other anti-trust legislation. That has been established in the Hutcheson case. It has been reaffirmed in *Hunt v. Crumboch*, decided last June by the Supreme Court of the United States, and also in the *Bradley v. Electrical Workers* case. I might say in the *Bradley v. Electrical Workers* case the court held there was an improper combination there, but it was between, not the working man and the union or his bargaining agent or his representative, such as M. C. A.; it was with the employers, it was with the fabricators of electrical products, who themselves were engaged in commerce, and the court in that case stated that it found a combination within the provisions of the anti-trust laws, but stated that if it were dealing merely with the contractual relations between the union and an employer, it would not say, it would assume that such a contractual relationship was legal. And that is a very significant admission and statement on the part of the court, and it is very pertinent to this situation, because that is all we have here, is the relationship between the worker, the band leaders, and their agent for the purpose of obtaining employment.

The evidence, all of the evidence, viewed most favorably from the point of view of the plaintiffs in this case fails to show that that agent did anything beyond what was its appointed function on the part of the band leaders whom it [903] represented.

Now we come to the contracts which are involved in this case. There are two introduced in evidence. I believe they are Defendants' Exhibits E and F; two contracts

between Music Corporation of America and its alleged co-conspirator, Wayne Dailard. The first of those contracts was a letter form of agreement made in the year 1941, I believe, when Mr. Dailard was launching his first enterprise at Pacific Square in San Diego. That agreement committed Music Corporation of America to deal with Mr. Dailard on certain terms, namely, that they would give him or it would give him the first right of refusal, to be exercised within a period of forty-eight hours. I shall come back to that agreement immediately, but I should like to mention the second agreement. Although it was a more detailed and a more formal document, it was, in substance, no different on that point than the first agreement. It committed Music Corporation of America to give Dailard the first right of refusal. Dailard, in turn, agreed to buy a certain percentage or certain number, or, not to buy but to engage through Music Corporation of America a certain percentage or number of bands that he might use at his business location.

Now, as I understand it, the plaintiffs in this case do not contend that either of those contracts are illegal. On the contrary, I distinctly recall a statement or argument at [904] the motion for summary judgment that conceded that the agreements, standing by themselves, were legal contracts, and the laws and cases are to the same effect. Certainly, a band leader, or, Music Corporation of America, as the employment agent of a band leader, has the right to choose with whom he is to deal. And if we stop there, there is nothing wrong, there is nothing illicit, there is nothing within the condemnation of the Sherman Anti-Trust Act. It is the right of an American tradesman, it is the right of any person, the right of a working person, to elect to deal or not to deal

with any other person, and that is what we have here. That is what those two agreements purport to be. They are nothing but bargaining relationships between a dance hall operator and Music Corporation of America as the employment representative of band leaders. No more can be read into them than that, and the evidence in this case has failed to overcome what might have been, or has failed to establish what might make them an instrumentality in a combination, namely, that they were made or that they were enforced or that they were operative with the intent of the parties and for the purpose of restraining interstate trade in entertainmmt.

Let us examine that for a moment. The evidence is uncontradicted and unequivocal to the effect that when the agreement between Music Corporation of America and alleged co-conspirator, Dailard, was made in 1941, Mr. Finley was not [905] only not at San Diego in a dance hall, he was not in the amusement business at all. He had not loomed upon the horizon, so that by the widest stretch of the imagination it could not be said that the defendants and Dailard had in mind any intended restraint against Finley, or against any other unidentified operator of a ballroom in San Diego, or elsewhere.

The court will recall the testimony that Dailard saw the opportunity for a first-class ballroom being established at San Diego, and he wanted assurances that after he launched such a venture, which entailed considerable expense and risk to himself, that he would have the assurance of entertainment to go into the ballroom, and it was for that reason, motivated by those considerations, that he went to Music Corporation of America, and after some negotiation it did agree that he would be furnished such bands.

Now, we come to the second agreement, and I say the same of it as I did of the first engagement. That anteceded the presence of Mr. Finley in the San Diego area, and his activities in ballrooms in San Diego. It was made, I believe, in the month of May, 1944. It was a clear contractual bargaining arrangement between the representative of the band leaders, who had their services to commit, and the operator of a going business to receive that type of entertainment. It did nothing more than give Mr. Dailard the right of refusal for twenty-four hours. I say that those agreements are clearly [906] innocuous; under the law, they are not only permissible, they are the recognized requisites of business conduct today.

As the court pointed out, the Supreme Court of the United States pointed out, in the American Tobacco Company case some thirty-five years ago, and in the Standard Oil cases, if a literal interpretation is to be given to the Sherman Act, it would be impossible for American business to function today, because every bargaining relationship between persons does entail restraint, and the court, in its historical cases, declared that the word "reasonable" must be read into the language of the Sherman Act; and from that day to this, with the exception of variance, it is a recognized, implied term of the statute that before any combination or any agreement falls within the censure of the law it must be an unreasonable one.

I assert that there is no evidence whatever in this case to establish either that the agreements between the defendant, Music Corporation of America, and Dailard, were unreasonable or that they were made or enforced for the purpose or with the intent or with the direct or

proximate result of injuring the plaintiffs Finley in the conduct of their ballroom operations at San Diego.

Now, on the aspect of this argument that there is no commodity of commerce that has been restrained, I should like to consider briefly the essential subject-matter, as plaintiffs [907] have elected to place it in this case, namely, name bands. I submit that in view of the evidence put on through the witnesses of the plaintiffs, and through the testimony of the plaintiff, Larry Finley, himself, that there is no clear, definite, definable, tangible thing known as a name band. It is a euphemistic term, it is an elastic term. It has been distorted here to the point where we get great big name bands, big name bands, name bands, semi-name bands, top bands. It runs the whole gamut of the band boys. So how could a jury, committed with the responsibility of determining a question of fact, say that there has been a restraint in the matter of providing name bands or in preventing the plaintiffs Finley from obtaining name bands?

Now we come to the point of the proof as to the participation in an unlawful combination or conspiracy, or participation in concerted action on the part of the three defendants who remain in this case, the corporate entity, Music Corporaion of America, and the individual defendants Barnet and Bishop. The court has already declared itself, and the plaintiff has acted accordingly, in dismissing as to the defendant Stein. I submit that there is no evidence worthy of submission to this jury that the corporate entity, Music Corporation of America, has participated in any unlawful conduct. There is evidence, sparse though it is, that the defendant Bishop made certain statements of intent and of [908] purpose favorable

to the alleged co-conspirator, Dailard, and adverse to the position of the plaintiffs Finley, but there is no evidence showing, even reasonably, that Bishop was acting upon the direction of superior officers of Music Corporation of America, or that he had authority, on the part of his corporate principal, to engage in the activities which were so produced in evidence.

The evidence, as it stands now, is that Bishop in those particulars was acting solely by himself. Likewise, there is no evidence that the defendant Barnet committed any act that could measure up to participation in an unlawful combination or conspiracy. As I recall the testimony, the most he did was by way of negation. He was called upon, called over the phone by Mr. Finley, and asked if he had done anything, if he had seen his attorneys yet and if he had decided to give him the bands, and the thing sort of dissolved itself after a period of time, and nothing came of it. It is true that he is asserted to have said that there is a contract with Dailard and it is going to be tough to get around it, but I think we can. Now, that is the strongest evidence, I submit, of any participation on his part in any irregular or improper conduct, if that may be so denominated, and I submit it cannot be. It is merely a man reflecting—his reflection, if you please, as to whether he would breach one contract in order to provide service to another party. I submit that if he had [909] accommodated himself to the demands of Mr. Finley, he might then have been guilty, according to the plaintiffs' theory, of a conspiracy with Finley, as distinguished from one with Dailard, because Finley was then asking for something that Dailard then had. So if it was a conspiracy he engaged in with Dailard, we

submit plaintiffs claim damage because he refused to go into a conspiracy with the Finleys.

Now we approach the question of damages. The court has anticipated one point which we, of the defense, believe to be sound and applicable in this case, and that is the doctrine stated by the court in the Second Circuit in *Connecticut Importing Co. v. Frankfort Distilleries*, which is reported at 101 Fed. (2d) at page 79. As the court read, and I shall not repeat the language from that case, the damage to which a plaintiff is entitled by reason of the conduct of a combination which has injured him in his business is the damages which he has suffered up to the time the suit is filed, unless it is shown that there has been a continuance of the acts from that time forward. I submit that the evidence in this case does not show any such continuance. It does not show at all that there was any combination before, but certainly, if I may assume for argument's sake that there was questionable conduct, it does not show that that continued from the time the suit was filed. There was a first refusal, or, rather, it wasn't a first refusal, it was an inability, if you may [910] call it that, on the part of the plaintiff to obtain bands through Music Corporation of America for his opening, and he stated that he had suffered no damages up to that time, and the acts of which he complains thereafter certainly do not measure up to any illicit combination or conspiracy. In that connection we have the issue which, I submit, is improperly injected in here. It is not within the framework of the pleadings. That is, of monopoly. They allege here a conspiracy to restrain trade, but there has been a lot of loose talk about monopoly, about Music Corporation of America controlling 90 per cent, or 95 per cent, or most, or the best of the

bands. I think plaintiff's own evidence is the best refutation of that argument that there is. Plaintiff had as big name bands as are known to exist, in the persons of Tommy Dorsey and Jimmy Dorsey, and on his opening night he had admittedly a name band, Henry Busse; and he has access to, and in so far as the record shows, the exclusive access to the William Morris represented bands. The court will recall the letter which the representative of that organization submitted to Mr. Finley for incorporation in his bid to the City Council of the City of San Diego, in which they stated, "We would like to deal with you on an exclusive basis," and then they proceeded to enumerate the bands under their representation. Likewise the other agency, the General Amusement Corporation, enumerated those which it had, and Frederick [911] Brothers. So that, according to plaintiff's own case, as presented here, there has been no monopolization of bands, there has been no restraint of bands.

Now, if I may get back to these agreements that were enforced one time between the Music Corporation of America and Dailard. The court will recall the evidence that Mr. Dailard terminated all relationship with the Pacific Square Ballroom as of July 1, 1945, and from that date he has had no connection whatsoever with the operation, and that Mr. Stutz is a free agent so far as the previous contracts of Dailard were concerned. So that there is not even any written contract here that might serve as the basis for the claim that there was an unreasonable restraint of trade through the medium of contractual relationships between the parties.

On this element of damage again, I submit that there has been a great variety of evidence, a great variety of

figures. The court has been most indulgent with the plaintiffs in submitting whatever type of evidence they thought might establish their claims, but a great amount of this evidence, and the evidence which they hope to serve as the connecting link between injury and dollars, is evidence relating to the Pacific Square Ballroom.

I do not have it before me at the moment, but I know from memory the case of *Ball v. Paramount Pictures*, I believe it was, in which the plaintiff sued the larger producers and [912] distributors of motion pictures and sought to effect recovery for the losses sustained in his theatre, and he sought in that connection to introduce records financial records of Paramount Pictures in operations in other territories, in other aspects of its business, and the court rejected any such basis of damages. Likewise, in the case of *Bigelow v. R-K-O Radio Pictures*, a case decided last summer in the Seventh Circuit, and which I believe the plaintiffs have referred to in their proposed instructions to the jury. The plaintiff there sought to establish damages on the basis of theatre operations in Illinois some dozen miles from his location, I believe, in Wisconsin, and the court stated that certainly was no proper basis for fixing or determining the amount of damage which he sustained in his operations. So I submit that any evidence relating to the Pacific Square operation, the profit or the loss, or the policy, is not a proper yardstick for the measurement of damages, and that without them there is no norm in this case.

Furthermore, in this case the plaintiffs and their auditors stated on the stand that the Mission Beach operation, as undertaken by them on January 1, 1945, was a new venture. The auditor stated that he went down there and

he created an entirely new set of books because it was a new operation, it wasn't a continuance of the old one. Mr. Finley, at great length on the stand, emphasized that he entered that project [913] for the purpose of establishing and pursuing a new policy, a policy of name bands, as he termed them, against the western bands and the family policy which Mr. Dailard had pursued, and, if you please, a very high moral policy and a very intense civic policy, as distinguished from what counsel has elected to call the haphazard policy of the alleged co-conspirator, Dailard.

I think the court has in mind all the evidence which has been presented, and I will not labor the evidentiary aspects of this case, but I will content myself in conclusion by saying that there is no evidence in this case worthy to go to the jury on the point of a conspiracy or a combination, or a concerted action of the defendants who remain in this case with the alleged co-conspirator, Dailard; there is no commodity of commerce, and there has been no interstate commerce in a commodity of commerce. Thank you. [914]

The Court: I don't think I care for any argument from the other side at this time.

The rule, of course, at this stage of the case is well known and clearly established that if there be any reasonable theory deducible from the evidence, either by inference or by direct testimony or documentary proof, that would warrant a finding favorable to the plaintiff, the court should deny the motion. I am not going into the details of it because it is not proper to do so, or necessary to do so, at this time.

There are one or two legal questions that have been threshed out before, and concerning which the court has made rulings which are in the record. One of them is the nature of interstate commerce in present-day activity.

I don't know whether the doctrine of *Federal Baseball Club v. National League* in 259 U. S., at page 200, and that of *Hart v. B. F. Keith Vaudeville Exchange*, in the Second Circuit, reported at 12 Fed. (2d), at page 341, is a present-day doctrine, in view of the decisions of the Supreme Court of the United States during the last five or six years, and since the *Socony-Vacuum* case. Business has changed. It has changed in all of its aspects. Entertainment, instead of being a matter of personal performance, has merged into something else. The integrated agencies in the amusement enterprise have become so far-flung, and yet so knitted, that the [915] situation that confronted the courts in the days of those decisions is no longer applicable. It is a difficult question to draw the line of demarcation in what is purely a personal performance not merging into interstate activity, and one that closely touches the interstate commerce clause of the Constitution. That is illustrated by such laws as the Wage and Hour Law and the National Labor Relations Act, and many other like statutes which are remedial in their aspect. While they may not be definitely applicable to a situation such as the evidence here has presented, they do throw light upon the changing course of the law, not of the Constitution, because, of course, personal service is not the subject of governmental regulation and we are all hopeful that it never will be to the extent that it would be controlled. But at the same time business has so changed. The various means of communication, new and modern in current life, have so transformed the entire

picture of human activities and human relationships, that the line of demarcation cannot be drawn with precision and nicety.

I am inclined to think that the trend of the decisions is that there is sufficient evidence here to warrant the submission of the case to the jury, under proper instructions, of course, as to how their deliberations should be pursued. The question as to "name bands" brings into consideration new entities. The evidence is clear to the fact that [916] there are gigantic business entities that have grown up for the purpose of promoting these bands, which is indicative of the fact that it is a business, it is commerce. With the use of media of communication, the radio and others, for the purpose of exploiting individuals, as well as methods of expression by individuals, and the various other means of rapid communication, it is pretty hard to say just where the line should be drawn between intrastate activities or activities of purely personal concern, and where they merge into interstate commerce.

Cases such as the Associated Press case are highly illustrative of the changed conditions that have occurred. If there is anything that should be preserved, it is the security of expression through the press, and yet we find the Associated Press case maintaining doctrines which bring that activity within the purview of congressional legislation under the commerce clause of the United States. So it is something that is in a formative period, and I am not prepared to say at this stage of the case that this does not present a matter of interstate activity.

The issue of "name bands" is a factual question. Apparently, even these gentlemen who deal in that entity or commodity or relationship are not in agreement as to what a "name band" is. It may be that it is of such a nebulous character that there can be no legal certainty to it. That is a factual [917] matter to be determined by the jury. The other questions that have been argued are factual questions. It is neither proper nor appropriate that the court should at this time express itself on this question of conspiracy. There is evidence here that may leave the predicate for a finding on that score, not on the mere fact of a conspiracy, because that has no federal aspect in and of itself, but on an alleged conspiracy and undertaking, an agreement to unreasonably affect or interfere with interstate activities. This word "conspiracy" sometimes has connotations which are not proper in the law. It is simply an understanding or agreement to do something which either as an end or a means violates some law, so that it becomes a factual question in cases, especially at this stage of the action. The court is not indicating any view upon it at this time, as to how it should be determined, and what rulings the court makes now are made without prejudice to review them later on, if they are deemed to be erroneous.

For those reasons the motions will be denied in toto.

We will meet tomorrow morning at 10:00 o'clock, gentlemen.

(Whereupon, at 4:45 o'clock p. m., Wednesday, February 6, 1946, an adjournment was taken until 10:00 o'clock a. m., Thursday, February 7, 1946.) [918]

Los Angeles, California, Thursday, February 7, 1946.
10:00 a. m.

The Court: All present. Proceed, gentlemen.

I would suggest, if it is agreeable to all of you, that when the defendants proceed you gentlemen exchange places, unless you desire to remain where you are, gentlemen. It is pretty hard to see witnesses from that desk and it is more readily available to examine witnesses where you can see them. Yet, if you desire to remain there it is immaterial to me.

Mr. Warne: There is no objection to using the podium?

The Court: Oh, no, not at all; it is perfectly all right. Ordinarily it is not, but in this case it is all right.

Mr. Doherty: I am going to make Mr. Warne do some of the work now, your Honor, and will let him make the choice.

Mr. Warne: I suggest we not disturb our relative relationship.

The Court: Very well. Have those financial statements been submitted?

Mr. Christensen: They are being typed and will be right up in five minutes, I think.

The Court: Very well.

Mr. Warne: Very well, Mr. Harold Howard. [920]

HAROLD HOWARD,

a defendant herein, having been previously duly sworn, was called as a witness on behalf of the defendants, and was examined and testified as follows:

Direct Examination

By Mr. Warne:

Q. I believe you have been sworn. Just take the stand, please.

You have already related that you are employed by the Music-Corporation of America? A. That is correct.

Q. And we will use the term, if we may, "M. C. A.", in referring to that company? A. Yes.

Q. Are you employed by any other company such as M. C. A. Artists, Inc.? A. No, sir.

Q. How long have you been employed by M. C. A.?

A. Since September of 1944.

Q. Prior to that time in what business or occupation were you engaged?

A. I was a pilot in the Army Air Corps for the three years preceding that.

Q. And before that?

A. An orchestra leader. [921]

Q. That is, you have operated an orchestra or you ran an orchestra or had an orchestra?

A. That is right.

Q. Hired musicians?

A. Hired musicians and traveled and engaged in the orchestra business in general.

Q. And your band or orchestra was known as what?

A. Hal Howard and His Orchestra.

(Testimony of Harold Howard)

Q. Played throughout the United States, engagements?

A. I wouldn't say that. About as far East as the Mississippi River, and up and down the Pacific Coast.

Q. Were you what was called a name band?

A. I would like to have considered that.

Q. Well, were you booked under your own name?

A. That is right.

Q. In various places throughout that territory?

A. That is right.

Q. Ballrooms?

A. Ballrooms, night clubs, cafes.

Q. Did you have a booking agent? A. Yes, sir.

Q. What agent?

A. Music Corporation of America.

Q. Did you know Mr. Finley prior to the time that you became employed by M. C. A.? [922]

A. As a booker, or in what capacity?

Q. Well, in any capacity.

A. I knew Mr. Finley when I was an orchestra leader, in the year 19—I believe it was about 1937 or 1938, at the Casino Gardens.

Q. And did you play there on that occasion?

A. Yes, sir.

Q. For one of his give-away dances?

A. I was employed there on a permanent engagement, so to speak, for a period of about six or eight weeks, and during that time Mr. Finley had one of his—I guess you would call it parties, or whatever name you would use for it.

(Testimony of Harold Howard)

Q. I see. Bernie Cohen was running the Casino Gardens at that time, was he?

A. Bernie Cohen and Mr. Cramer were partners.

Q. Mr. Cramer has since died, hasn't he?

A. That is correct. [923]

Q. Now, when, after you became employed by M. C. A., did you first meet Mr. Finley?

A. In San Diego, in about—either the last week of September or it might possibly have been the first week of October, 1944.

Q. What was the occasion?

A. I was down there, and at that time I was working on the cocktail units.

Q. What is a cocktail unit?

A. Well, they are a small combination of three or four pieces and usually play in cocktail lounges or small restaurants.

Q. That is a musical aggregation that is booked by booking agencies, such as M. C. A.?

A. Yes, sir.

Q. Other agents also book them?

A. Yes, they all do.

Q. All right. You were down there?

A. I was down there booking all possible business in cocktail units in the city of San Diego, because there are a great many places that use that type of unit, and during my calls on various places I called at the Trianon Ballroom, and at that time met Mr. Finley. At that time I didn't know he was connected with it. He then had Anson Weeks' orchestra in there, and we had a conversation in his office. That was either the last week in September or the first week in October. [924]

(Testimony of Harold Howard)

Q. Will you relate the conversation that you had there at that time?

A. Well, as nearly as I can recall, we discussed possible bands for the Trianon. At that time that was a little bit out of my field because cocktail units was about the only thing I had attempted to handle. We discussed the band that was there at that time. It was a band under the direction of Anson Weeks. Actually the band was, I believe, Curt Sykes' band. I believe at that time Mr. Finley advised me he was bidding, and expected to get the Mission Beach ballroom, and asked me whether or not I would be able to get bands for him, and what was the picture on it. Inasmuch as I had been with the company only three or four weeks, I wasn't too sure on the question, and I suggested that we have a meeting with Mr. Barnet, which I later arranged.

Q. That meeting was arranged in Los Angeles?

A. That is correct.

Q. The next time you saw Mr. Finley was here in Los Angeles?

A. That's correct.

Q. Where was that meeting held?

A. It was held in our office, in Mr. Barnet's office in the building?

Q. That is which building now?

A. It is a building located at 9370 Burton Way; the [925] Music Corporation of America Building, I guess you would call it.

Q. Formerly the band department occupied space in that building?

A. That's right.

Q. At the present time they are located at another location?

A. That's right.

(Testimony of Harold Howard)

Q. What is their present location?

A. 9200 Wilshire Boulevard.

Q. Now, was any one else present at the conversation besides you, Mr. Finley and Mr. Barnet?

A. I don't believe there was. I believe the three of us were all that were present at that time.

Q. Well, can you fix the date, either as to time or with reference to any other date?

A. I couldn't be definite. It might have been about the second or third week in October.

Q. I see. Relate the conversation.

A. Mr. Finley asked Mr. Barnet about the band picture, because at that time he explained he expected to get Mission Beach Ballroom, he was bidding on it and felt his bid would be successful in the competition. And Mr. Barnet explained to him at that time that we had, I guess you would call it, a first refusal agreement with Mr. Wayne Dailard, and that if [926] there were enough bands for both places that Mr. Finley—that the bands would be available to him after Mr. Dailard had refused them or he had been submitted the bands.

At the same time Mr. Finley, I believe, spoke about the possibility of a ballroom operation in Burbank, and at that time Mr. Barnet advised him that we would be happy to cooperate with him in any way, in helping him get established in Burbank. And I believe at that same meeting Mr. Barnet suggested to Mr. Finley to check on a possibility of a ballroom in Oakland, because they had a ballroom there which was not satisfactory, and the town was dance-conscious and it should have been a good spot for a dance hall operation.

(Testimony of Harold Howard)

Q. That is what Mr. Barnet said? A. Yes.

Q. Was there anything said about the possibility of having two ballrooms in San Diego?

A. I am not positive, Mr. Warne: I know that the subject was discussed at one of our meetings with Mr. Finley, that Mr. Barnet voiced the opinion that San Diego wasn't big enough to handle two competitive ballrooms, both playing big bands at the same time. I am not sure whether it was at that meeting or the following meeting which we had.

Q. It was at some meeting when Mr. Finley was present? A. Yes.

Q. Was anything said at that first meeting about Mr. [927] Finley going to Casino Gardens or getting into Casino Gardens?

A. I don't recall. I don't believe there was.

Q. Now, when was the next time—oh, let me ask you another question there. Was anything said at that time about Pacific Square or Mr. Dailard having an exclusive booking arrangement with M. C. A.?

A. I don't believe I have ever heard the word "exclusive" used in itself. I just know the word "first refusal" was used, where the bands were first to be submitted to Mr. Dailard.

Q. Now, when did you next see Mr. Finley?

A. The next time was in San Diego, and it must have been about the first week in November. It was at the date whenever the council meeting was held there.

Q. And what was the occasion? Did you go down there?

A. Yes. I flew down with Mr. Bishop.

(Testimony of Harold Howard)

Q. When was the first time that you saw Mr. Finley on that day?

A. I didn't see him that day. The first time I saw him was that evening. It might have been around 9:00, or maybe even as late as 10:00 o'clock.

Q. You were not at the council meeting that has been told about? A. No, sir.

Q. Where did you see Mr. Finley on that occasion? [928]

A. At his ballroom, the Trianon Ballroom.

Q. Was any one with you when you went to the Trianon? A. Mr. Bishop was with me.

Q. Just relate what occurred there on that occasion.

A. We were calling on various accounts in San Diego, cocktail accounts, and things of that nature, and along with those calls we stopped at the Trianon Ballroom.

Q. By "we" you mean? A. Mr. Bishop and I.

Q. Yes.

A. And when we arrived upstairs, I introduced Mr. Bishop to one of the men, who was manager of the ballroom, whom I had previously met, and Mr. Bishop saw the band leader, who was Ken Baker, and started conversing with him. At that time I went in and started talking to Mr. Finley in the office. And there was another gentleman present in there whose name I don't recall. I believe he was an associate or maybe a friend of Mr. Finley's.

Q. Now, Ken Baker, or, rather, Mr. Bishop stayed outside and talked to—

A. That is correct, to Ken Baker, and Mr. Finley and I talked a little while. He told me he felt very bitterly toward Mr. Bishop for having come down, and

(Testimony of Harold Howard)

he felt he was—that Mr. Bishop wasn't looking out for his interests, he was looking out for Mr. Dailard's. And I told him Mr. Bishop [929] was outside. He said he wasn't interested in meeting him, but I suggested the two of them talk, because I felt if they would get together they could become friends and straighten out whatever differences they had. I believe about that time Mr. Bishop came in the office.

Q. Had there been anything suggesting that they had any personal differences? A. No.

Q. Not by any one?

A. Not that I know of, no.

Q. Then Mr. Bishop walked into the room; is that correct?

A. Yes, Mr. Bishop walked into the room, and we talked, it must have been about a half an hour about the booking picture in general as regards Mission Beach and the problems which Mr. Finley expected to encounter there. And Mr. Bishop again informed him of our arrangement with Wayne Dailard, and also at that meeting Mr. Bishop discussed with Mr. Finley the possibility of his going into a ballroom operation in Burbank or in Oakland.

Q. Was that the substance of the conversation?

A. That basically was the substance of the entire conversation.

Q. Was anything said on that occasion about Mr. Bishop's connection or Mr. Bishop's favoritism to

(Testimony of Harold Howard)

Mr. Dailard and Pacific [930] Square, by either of the parties?

A. That is a hard question to answer, Mr. Warne. Mr. Finley, I believe, expressed the opinion that Mr. Bishop was showing favoritism to Pacific Square.

Q. And what was Bishop's reply to that?

A. Bishop's reply to that was that was a first refusal agreement whereby bands were first to be submitted to Pacific Square before being submitted to any one else, and at that time told Mr. Finley, I am sure, that he was even having difficulty supplying Pacific Square with bands, and it would be extremely difficult to supply both places with good calibre bands.

Q. Was anything said about the prices of bands?

A. Mr. Finley expressed the opinion that he thought that Wayne Dailard was paying excessive prices for bands, and, in his opinion, he did not feel it was good business, and said he did not feel he would like to pay those prices.

Q. Any specific names of bands that were discussed? Do you remember or not?

A. I am not certain.

Q. Did Mr. Finley say anything about when he was going to open the ballroom? [931]

A. I am not certain of that.

Q. You have no further recollection of any matters that were discussed there?

A. No. The conversation was quite general.

Q. Was anything said about Ken Baker and the unit that was playing there at the time, at the Trianon?

A. Well, I am not certain of that. It must have been discussed, but I am not sure of any specific conversation.

(Testimony of Harold Howard)

Q. When next did you see Mr. Finley?

A. The next occasion was when Mr. Finley came to Los Angeles and also had another meeting with Mr. Barnet.

Q. Was that the Copper Kettle luncheon episode?

A. After they had met in Mr. Barnet's office they went over to the Copper Room, it is, on Beverly Drive.

Q. Copper Room?

A. Copper Room; and I was in and out during that first meeting so much that I was not even in on the conversations. And later—

Q. Were you in and out at luncheon?

A. No; in and out at their meeting before they went to lunch. I joined them at the Copper Room.

Q. Do you remember the conversation at the Copper Room?

A. I don't remember exact conversations. Bands undoubtedly were discussed, because I know that is why Mr. Finley was here. [932]

Q. Was anything said at that time about booking bands direct?

Mr. Christensen: To which we object as leading and suggestive.

Mr. Warne: I am talking about the subject matter. I am not asking him about what was said or what was said.

The Court: Overruled.

A. At the meeting, I am not certain, Mr. Warne, whether this was in the Copper Room or before we went over, Mr. Finley did ask Mr. Barnet if he had any objections or if there was anything to prevent him from going to the bands direct and arranging his own bookings.

(Testimony of Harold Howard)

Mr. Barnet informed him that he had no objections and there was no reason why he couldn't do that.

Q. By Mr. Warne: Was there anything said in the conversation with reference to acts or attractions, as they are sometimes called, as opposed to bands?

May I ask that you keep your hand down from your mouth?

The Witness: Yes, sir.

Mr. Warne: Because the jury has to hear, and sometimes it is difficult to speak effectively.

A. I don't recall any conversations regarding acts or attractions at that meeting.

Q. Anyone else sit in on the luncheon except you and Mr. Finley and Mr. Barnet? [933]

A. Mr. Later, I believe, was at the lunch, and I believe Billy McDonald was there.

Q. Do you remember the names of any bands or band leaders being discussed in that conversation?

A. I am not certain of that; no, sir.

Q. Was there any discussion of the Trianon or Trianon bookings for the Trianon ballroom on that occasion?

A. I am not certain of any exact conversations. At some time during this period I talked with Mr. Finley about the possibility of bringing back Kurt Sykes' orchestra. I am not certain about the date of that.

Q. I see. There has been some mention here with reference to a Paul Martin booking. Was that made through you or with you? A. Yes, sir.

Q. When was that made, approximately?

A. This is approximate. It must have been about the last week in December.

(Testimony of Harold Howard)

Q. Will you just relate what occurred on that occasion?

A. Well, Mr. Finley was up here at the time and was down in the office which we had. We had a theatre fixed up as a temporary office in our building. There were about four desks, as I recall, in that one building. And Mr. Finley and I discussed the possibility of bringing Paul Martin down to the Trianon; and Paul Martin was available at that [934] time so I called Paul Martin and got his authorization for the booking. He agreed to accept it and we practically terminated our booking right there, because we had Mr. Martin's confirmation and Mr. Finley's, and it seemed agreeable all the way around. And following that, I believe I went up immediately to Mr. Barnet.

Q. Was Mr. Finley with you?

A. Mr. Finley was with me; yes, sir. And I went up to Mr. Barnet's office to inform him of the booking; and he asked me if I had definitely committed the booking, definitely had arranged it. So I had at that time, because I had already called all the parties involved. So he said we would go ahead with it, and about that time instructed me to have the publicity department take our name off of the publicity on the Paul Martin engagement of the publicity used.

Q. Anything said about the contracts that should be used?

A. Yes. He said that the contracts, instead of being made on our usual form, which is American Federation of Musicians and with our name printed on the top, should be prepared on a regular American Federation of Musicians form without our name.

(Testimony of Harold Howard)

Q. At that time or at any other time did Mr. Barnet ever tell you that you should not book any bands for Larry Finley? [935] A. No, sir.

Q. Did Mr. Barnet at that time or at any other time ever tell you that you should not book any bands for Mission Beach? A. No, sir.

Q. Now, I want to get the picture of this building there. You spoke about a theatre. Was that an old audition room being occupied?

A. It was used as an audition room, and some bands even used the room to rehearse at various times. More than anything else, it was used as an audition room for small cocktail audiences.

Q. Mr. Barnet's office was in another part of the building?

A. Yes, sir; it was upstairs in one of the wings of the building.

Q. And Mr. Bishop's office was where?

A. Directly across the hall from Mr. Barnet's office.

Q. Subsequently did you see or talk to Mr. Finley on any other occasions?

A. I believe I had a telephone conversation with Mr. Finley after the Paul Martin booking was completely signed. I am not certain of the subject of the conversation. It was in regard to the Paul Martin booking. Following that, the next time I personally— [936]

Q. By the way, Paul Martin played the Trianon?

A. Yes, sir.

Q. On the dates that you had arranged on the occasion of that booking? A. Yes, sir.

(Testimony of Harold Howard)

Q. Now, the next time you—

A. The next time I personally saw Mr. Finley was when he came up to see Mr. Later whose desk was about 10 or 12 feet from mine in this auditorium or in this theatre.

Q. And was there any discussion of any band bookings with you on that occasion?

A. I am not certain.

Q. Do you recall Mr. Finley asked you on that occasion about the bookings of any one band or any bands you might have had open?

A. It is very possible, Mr. Warne, that he did. I am not sure of the conversations.

Q. All right. Now, then, this conversation when he was discussing matters with Mr. Later, did you sit in on that conversation or just see him there with him?

A. I wouldn't say that I sat in on it. Almost everything that happened downstairs everybody was in on that was down there.

Q. Did you overhear what subject matter was being discussed? [937]

A. Yes, sir. Mr. Finley was discussing available attractions for presentation at Mission Beach.

Q. By attractions you mean acts other than bands?

A. Acts and picture personalities.

Q. I see. That is other than bands?

A. Yes, sir.

Q. Do you recall any other conversation or anything specific about the conversation, any part that you took in it?

(Testimony of Harold Howard)

A. No specific part that I took in that conversation, because it was held with Mr. Later. I know that they were discussing attractions.

Q. When next did you have any conversation with Mr. Finley?

A. I believe the next time that I was in touch with Mr. Finley was by telephone.

Q. And what was the occasion?

A. During the month of—sometime during the month of February—I am not certain just when it was, and we had been advised that Mr. Finley had two or three weekends at Mission Beach on which he was open for bookings on bands. At that time I wanted to submit him Ted Fio Rito and Jack Teagarden.

Q. Well, relate the conversation, rather than just saying you submitted him. [938]

A. Well, I called Mr. Finley and advised him that we had Jack Teagarden and Ted Fio Rito, both open and available on the dates that he had requested—that I had been advised that he was requesting. Mr. Finley at that time, when I quoted the price, said he felt the price was excessive for the bands. He said that he didn't feel that he wanted to engage them for that time, mainly for that reason—and I believe in that same conversation I again asked him about Kurt Sykes for the Trianon ballroom.

Q. Was there anything said about Bob Chester? Do you remember that?

A. Bob Chester we also submitted at the same time, as I recall.

(Testimony of Harold Howard)

Q. Do you know—or, by the way, on that occasion you wrote this letter to Mr. Finley of February 27th, Defendants' Exhibit K?

A. Yes, sir. This letter was written after my telephone conversation with Mr. Finley.

Q. Does the looking at the letter refresh your recollection as to any other matter that may have been discussed?

A. Well, yes. I didn't recall this, but in the letter, when Mr. Finley expressed the opinion that the price was too high on the bands, he was operating at that time two days a week. Sometimes before that, in one of our conversations, he had expressed the thought that he might possibly, at some [939] time or other, operate three days a week. The prices on the bands which I submitted him were for a three-day period. Inasmuch as he was operating on a two-day basis, he felt the price was high on the bands. I explained to him at that time in some detail that bands of this caliber that were available for weekends would require a three-day booking in order to make it successful or profitable for them, otherwise, they would hold out and play one-nighters on separate engagements. That was the reason for the price being what it was. In other words, the price was the same I submitted to Mr. Finley for a two-day engagement as it would have been for a three-day engagement. And I thought possibly that he might, in view of that, elect to operate three days instead of two. And in the letter I call his attention to that as a reason why the prices on the bands were at that figure.

Q. I note in this letter you say in the last paragraph: "We are now making plans for the itineraries on these

(Testimony of Harold Howard)

bands. In case you desire to reconsider your refusal, it is important that you communicate with us at once." Did you ever hear from Mr. Finley again with reference to these bands? A. No, sir.

Q. Since that time have you ever heard from him? Since that time have you ever heard from Mr. Finley, by telephone or otherwise, with any request that you provide bands for [940] Mission Beach or give him names of bands that might be available?

A. No, sir; I haven't.

Q. In other words, he has made no request whatever of you? A. Not to me, sir.

Q. Did you handle the booking of any bands for Mr. Finley at Casino Gardens? A. Yes, sir.

Q. What bands did you book in there, do you remember?

A. I did not handle the actual bookings—booking, in this case, because I believe Mr. Finley had gone direct to Harry James. However, I did put through the contracts and handle the paper work on that, and—

Q. Did you ever—pardon me.

A. And along with that thought, I also handled the booking and the paper work on—let's see; Jan Savitt's orchestra, which currently is today in there, but I do not believe Mr. Finley is connected with that. I handled the paper work and the booking on Charlie Barnet for Mr. Finley.

Q. Did you see and talk to Mr. Finley on occasion while this was being done? A. Yes, sir.

(Testimony of Harold Howard)

Q. On any of those occasions did Mr. Finley ever request that you submit to him the names of any bands? [941]

A. For Mission Beach?

Q. For playing at Mission Beach-

A. No, sir.

Q. Did he ever suggest to you the names of any bands that he would like to have you hire for Mission Beach?

A. No, sir.

Q. Was there any discussion about Mission Beach in those conversations?

A. Not about Mission Beach; no, sir.

Mr. Warne: You may cross-examine.

Cross Examination

By Mr. Christensen:

Q. With reference to this Charlie Barnet booking, when was that, sir?

A. The Charlie Barnet booking started, I believe, Mr. Christensen, on October 31st. I am not positive of that. I believe Mr. Finley had talked with Barnet about it previously.

Q. That was in New York, according to your information?

A. Yes, sir.

Q. And Charlie Barnet played for Mr. Finley at Mission Beach when?

A. He played for Mr. Finley at Mission Beach on the weekend. I believe it was the last weekend in December and—

Q. And also— [942]

A. And New Year's Eve and New Year's Day and the following weekend.

(Testimony of Harold Howard)

Q. Now, then, the first Friday—

The Court: Just a moment. I would like the year there, Mr. Howard.

The Witness: That year was this current year.

The Court: 1945?

The Witness: 1945 and the New Year's Day of 1946, sir.

The Court: Was the conversation in New York in October of 1945?

The Witness: Mr. Finley's conversations with Mr. Barnet were undoubtedly preceding October, probably in September, or even August, in New York.

Q. By Mr. Christensen: Now, you recall that Mr. Barnet, Charlie Barnet, played for Mr. Finley at the Mission Beach ballroom on the first Friday in January, don't you? A. Yes, sir.

Q. Well, that is to say, he was supposed to play there under the contract? A. That is correct.

Q. But he did not show up? A. That is correct.

Q. Charlie Barnet called you and advised you that he was ill or indisposed, didn't he?

A. A young lady friend of his called me and advised me [943] of that.

Q. Did you communicate that information to Mr. Finley? A. No, sir.

Q. Did someone tell you not to? A. No, sir.

Q. And you know that because of that information not coming to Mr. Finley they were required to make refunds there on account of it? A. That is correct.

Q. Were you ever instructed by any of your superiors not to discuss bands with Larry Finley?

A. No, sir.

(Testimony of Harold Howard)

Q. Were you instructed by them to not discuss bands with Mr. Finley concerning bookings at Mission Beach?

A. No, sir.

Q. At no time? A. At no time.

Q. Mr. Paul Martin was under contract to M. C. A. at the time he was booked to play at the Trianon ball-room? A. That is correct.

Q. Was he offered to Wayne Dailard before being submitted to Mr. Finley? A. I don't believe so, sir.

Q. Who told you to prepare the contract on the American Federation of Musicians' form? [944]

A. Mr. Barnet.

Q. And did he tell you why?

A. No, sir; he didn't.

Q. You received—that is to say, M. C. A. received 10 per cent commission on that booking, did it not?

A. That is correct.

Q. And did Mr. Barnet or anyone else at M. C. A. tell you to not put the matter of the commission on the original of that contract?

A. May I answer that this way, Mr. Christensen? The amount of commission is not written on the contracts?

Q. Well, the percentage of the commission, I should have said?

A. Percentage is not written on contracts. It is only placed on one copy which goes to the Musicians' Union for their records.

Q. It was on the one you gave Mr. Finley, wasn't it?

A. If it was, it might have been in error, because ordinarily the contract price is the only thing which appears on those.

(Testimony of Harold Howard)

Q. Can you remember whether it was on it or not?

A. No; I am not certain.

Q. Mr. Howard, who dictated this letter to Mr. Finley bearing date of February 27, 1945, and being Defendants' Exhibit K? [945]

A. Is that the letter I just saw here, Mr. Christensen?

Q. Yes.

A. I dictated the letter with the assistance of Mr. Ames Bishop.

Q. I see. He told you what to put in this letter?

A. No, sir. I wrote the letter, and at that time his office was there, his desk was about three feet from mine.

Q. Mr. Joe Ross, one of the attorneys for M. C. A., had previously discussed this matter with you, had he not?

A. No, sir. He had discussed it, I believe, with Mr. Barnet.

Q. Oh, I see. And after that, this letter was written?

A. I assume that it was.

Q. You recall that Mr. Barnet did tell Mr. Finley that he, Mr. Finley, should go into business up in Oakland?

A. Yes, sir.

Q. Told him that if he opened a ballroom in Oakland, the M. C. A. would furnish him name bands?

A. Yes, sir.

Q. If he would open a ballroom in Burbank, M. C. A. would furnish him name bands?

A. That is correct, sir.

Q. Or, if he went into the Casino Gardens in Ocean Park, M. C. A. would furnish him with name bands?

A. Yes, sir. That was the policy there. [946]

(Testimony of Harold Howard)

Q. And you know that M. C. A. has been furnishing name bands to the Aragon ballroom there in Ocean Park, don't you? A. Yes, that is correct.

Q. But Mr. Barnet said that he could not or would not furnish bands to Larry Finley to be played at Mission Beach?

Mr. Warne: Just a moment. Are you attempting to fix this at any specific time? This is an impeaching question, sir. If I may offer an objection unless—

Mr. Christensen: It is cross examination.

The Court: Yes, I think it is cross examination.

Mr. Warne: Very well.

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

A. No, sir; he didn't say that. He said that the bands first had to be submitted to Mr. Dailard, and that if there were enough bands to provide Mr. Finley with bands after that, they would be available to him.

Q. By Mr. Christensen: To your knowledge, did Mr. Barnet or Mr. Bishop ever offer any bands to Larry Finley to play at Mission Beach ballroom?

A. I am not certain of that, sir.

Q. You never heard of any being offered, did you?

A. I personally submitted Ted Fio Rito and Jack Teagarden and the Bob Chester bands.

Q. But, with that single exception, you never heard of [947] one?

A. I don't believe there were any bands available at that time.

Q. This offer of Bob Chester and Jack Teagarden and Ted Fio Rito was after this letter had been written

(Testimony of Harold Howard)

by you to Mr. Finley? I am referring, of course, to Defendants' Exhibit K. A. No, sir.

Q. When did—

A. I talked to Mr. Finley on the telephone prior to the writing of that letter.

Q. How much prior, sir?

A. The letter was probably written within a couple of hours after our conversation.

Q. But, in any event, it was after the conversation with Joe Ross?

A. I have never conversed with Joe Ross on this.

Q. You knew about that, though, didn't you?

A. Yes, sir.

Q. And it was after that, wasn't it?

A. That is right.

Q. You knew, of course, that Bob Chester and Jack Teagarden had played together at Pacific Square ballroom just prior to the time you offered them to Mr. Finley?

A. I believe they had. I wasn't exactly aware of it, [948]but it is very likely that they had, because we play bands back down there sometimes two and three weeks consecutively.

Q. I mean that the two bands played in a single engagement? A. That is very possible.

Q. You never heard of that happening at Pacific Square before, had you?

A. I had never been in on the picture at Pacific Square, Mr. Christensen.

(Testimony of Harold Howard)

Q. And you know, of course, that at least from the box-office standpoint Jack Teagarden and Bob Chester had not been profitable?

A. I am not certain of that. I am not well enough acquainted with the figures at Pacific Square.

Q. Mr. Finley, of course, told you that they had proven to be a failure when playing together at Pacific Square?

A. It is possible he might have told me that. I am not certain.

Q. And he told you, also, that under those circumstances he certainly could not take just one of those bands and play it shortly after they had had that engagement at Pacific Square; that is right, isn't it, sir?

A. I am not certain, Mr. Christensen. I don't recall any specific conversation.

Q. And he told you, also, that so far as Ted Fio Rito [949] was concerned he felt that his price was high?

A. I believe he did. At some time during our conversation he expressed that opinion.

Q. He said, now, for three days at Pacific Square you had charged the same sum of money "that you are now asking me to pay for two days"?

A. That is correct. And I assumed that he might possibly want to operate for three days.

Q. Now, you recall, do you not, that at the time of the luncheon at the Copper Kettle Mr. Jan Garber was present?

A. I have been told that, Mr. Christensen. I didn't recall meeting Jan Garber there.

(Testimony of Harold Howard)

Q. As a matter of fact, you have a very hazy memory, do you not, of the conversation that occurred at the Copper Kettle? A. Yes, I do.

Q. And likewise, relative to the conversation that occurred at the office of the Music Corporation of America immediately before leaving for the Copper Kettle, do you not?

A. Yes, sir. I was in and out a good deal and did not spend the entire time in the office.

Q. As a matter of fact, you do not recall the conversation, is that right?

A. I wouldn't say that I don't recall it. I definitely do not recall any specific conversation that I know occurred [950] exactly at that time.

Q. At the time that you were present down there at the Trianon ballroom on the evening of the day that the contract was let to Mr. Finley—you recall that occasion?

A. Yes, sir.

Q. On that occasion you recall that Mr. Finley said to Mr. Bishop at that time that he thought it was a very low thing for him, Mr. Bishop to have done there at the Council meeting?

A. I am not certain of the exact words used. I would say that would sum it up in a general way. [951]

Q. And that he said that he thought it was a very low thing for him to have called Jack Flynn and asked Jack Flynn to withdraw the letter which he, Flynn, had theretofore given to Mr. Finley?

A. I don't recall anything of that nature, Mr. Christensen.

Q. Do you recall mentioning that he thought it was also a very bad thing for him, Ames Bishop, to have told

(Testimony of Harold Howard)

the other agencies that the contract had been let to Wayne Dailard?

A. No, sir, I don't recall hearing anything of that nature.

Q. Now, you say that the band appearing at that time at the Trianon was really Curt Sykes band, but it had for its leader Anson Weeks?

A. That is correct.

Q. That is a common practice, isn't it?

A. Quite often.

Q. So that really it is the aggregation that is important, isn't it, the musicians themselves that are an important feature?

A. Well, that is hard to say. Generally, if the band was bad, it wouldn't be acceptable to anybody.

Q. That is right. Now, is it not also true that it is the practice today to advertise specifically various members of the orchestra? [952]

A. I would say that is only true when a member is a star or well-known personality.

Q. Well, for illustration, the Harry James band, you are familiar with that, aren't you? A. Yes, sir.

Q. You know that in the advertising of Harry James they advertise not only Harry James, but "His Musicmakers"?

A. Well, you mean just the word "Musicmakers"?

Q. They say that, too?

A. "Harry James and His Musicmakers."

Q. Then they also follow it by featuring certain persons?

A. A band of that calibre usually has some star personalities or top performers in it.

(Testimony of Harold Howard)

Q. Now, you know, for example, in the Harry James band advertising, it generally says, "Featuring Ginnie Powell, Buddy DiVito, Corky Corcoran, Willie Smith, Juan Tizol, Jimmy Campbell, Arnold Ross, Lew Fromm"?

A. I am not certain of all of that, but I assume it to be true if you are reading from something.

Q. And you know that other bands do likewise?

A. Yes, sir, they name their feature artists.

Q. Now, you and Mr. Finley had various conversations concerning bands for the Mission Beach Ballroom, didn't you?

A. During the various times we met we usually discussed that in one form or another. [953]

Q. And you, Mr. Howard, tried to be as helpful to Mr. Finley as you could?

A. In any way I could, yes, sir.

Q. It was you who had submitted the Paul Martin band to Mr. Finley?

A. That is correct.

Q. It was only after Mr. Barnet learned about the fact that you had submitted it that it was put on an American Federation of Musicians contract?

A. That is correct.

Q. You never did that before, did you?

A. No, my experience in the booking of bands of that size at that time was rather limited.

Q. As a matter of fact, you had to do considerable searching to find one of those forms, didn't you?

A. I am not so sure of that, sir, because I am sure we had plenty of them around.

Q. That has been your first and only experience in doing it that way, hasn't it?

A. That is correct.

(Testimony of Harold Howard)

Mr. Christensen: All right. Think you very much, Mr. Howard.

Mr. Warne: Just a moment. I have another question or two, Mr. Howard? [954]

Redirect Examination

By Mr. Warne:

Q. Just so that we get it straight, in so far as you know Charlie Barnet is no relation to Larry Barnet?

A. I am certain there is no relation.

Mr. Christensen: I would even stipulate if you want that.

Q. By Mr. Warne: All right. Then let's get this straight: secondly, on this matter of Charlie Barnet some confusion had arisen with reference to the price at which he was booked?

Mr. Christensen: To which we object as leading and suggestive.

The Court: Overruled.

Q. By Mr. Warne: Is that correct?

A. You will have to explain what booking you are referring to.

Q. The Charlie Barnet booking with reference to which you had some conversation.

A. Are you talking about Casino Gardens?

Q. Correct, Casino Gardens. A. Yes, sir.

Q. Will you relate the contacts that you had with Mr. Finley in that regard?

A. Yes, sir. Mr. Finley had previously contacted Charlie [955] Barnet in New York and had made—first, let me go back to this. First, Mr. Barnet had talked to Mr. Finley regarding the booking, or to Birnie Cohen,

(Testimony of Harold Howard)

who was the manager of the ballroom, and Mr. Cohen had given him a definite commitment at a certain price and a certain percentage, and Mr. Barnet got Charlie Barnet's O.K. for that booking on those figures. Then Mr. Cohen called, or at the next meeting Mr. Barnet had with him, and said he had changed his mind, he couldn't operate the deal that way, after Mr. Barnet had gotten the confirmation from all of the parties involved. The disagreement, as I recall, was respecting the amount of percentage Charlie Barnet was going to get.

Q. Mr. Finley was objecting regarding the percentage Mr. Barnet was to get?

Mr. Christensen: That is objected to.

The Court: Overruled.

The Witness (Continuing): Mr. Finley then made a trip to New York and I believe he said he was going back there for some other reason, and while there would contact Mr. Barnet, this is Charlie Barnet, and talk to him regarding the disagreement on the percentage. I remember Mr. Finley did contact him back in New York, and arranged for the percentage agreement on the figures which he wanted to pay.

Q. By Mr. Warne: May I ask you this: with reference to the Teagarden band and the Ted FioRito band, they played [956] Pacific Square some time, or shortly after your February 27th conversation which you had with Mr. Finley?

A. Yes, sir, they did, both of them.

(Testimony of Harold Howard)

Q. Do you remember whether they played more than once, whether either of them played the Square more than once later in 1945?

A. Yes, sir, Ted FioRito was back there. I will take that back. He was back again in the first part of '46.

Q. I see. Now, relative to the names of feature artists being advertised along with the band, or along with the leader of the band, the advertisement there referred to the particular artist who performed as a part of the band; am I correct? A. Yes, sir.

Mr. Warne: In other words, you have an advertisement there. May I see it, please?

Mr. Christensen: Sure.

(The document referred to was handed to counsel.)

Q. By Mr. Warne: This one, Juan Tizol, is that how you say it?

A. I am not sure how it is pronounced.

Q. Do you know him?

A. I have heard of him. I don't know who he is or what he has done.

Q. Do you know what instrument he plays? [957]

A. No.

Q. Do you know any of the particular artists, that is, you yourself, do you know any of the names of the particular artists, any of those that were read off to you?

A. Yes, I know Buddy DiVito is a singer, and the girl, the first name, is a singer.

Q. Ginnie Powell?

A. Ginnie Powell. Smith is a saxaphonist and Corky Corcoran is a saxaphone player .

(Testimony of Harold Howard)

Q. In so far as you know, these individuals only render their personal services for the band or in conjunction with the band or orchestra?

A. That is correct.

Mr. Warne: By the way, I believe you had that original contract for Mr. Paul Martin, Mr. Christensen, when you were examining the witness?

Mr. Christensen: I had Mr. Finley's copy, which is not the original.

Mr. Warne: Isn't it a duplicate-original?

Mr. Christensen: I think so.

Mr. Warne: May I see it?

Mr. Christensen: Yes. (Handing document to counsel.)

The Court: While you are looking at that, I think we will take our recess. There will probably be some re-cross. We will take a recess for a few minutes, ladies and gentlemen, [958] and remember the admonition and keep its terms inviolate.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Warne: Mr. Howard, with reference to the musicians, or, rather, the feature artists who play with bands and who are sometimes advertised as playing with them, what is your knowledge or experience with reference to any changes that are made in those artists from time to time?

A. Changes occur quite frequently in all bands, and for that reason I think that is probably the primary reason when we send out publicity we send out only pictures of the leader or maybe the boy and girl singer with the band, and we send no group pictures at all, be-

(Testimony of Harold Howard)

cause the personnel does change, and perhaps some people would wonder why the same people weren't there if we did send the group pictures.

Q. That is, these artists or musicians change from one leader to another?

A. From one leader to another.

Q. Occasionally they start out with a band of their own?

A. That has been quite often.

Q. Something has been said about some conversation you had with Mr. Barnet about Joe Ross, or a call from Joe Ross. Just what was said about that?

A. Well, Mr. Barnet, I understood, had had a telephone [959] call, I believe it was from Joe Ross, in which Mr. Ross informed him that Mr. Finley had advised him he had certain dates open at Mission Beach. I have forgotten just exactly what those dates were. Anyway, certain dates were open, and Mr. Barnet then informed me or asked me who we had available for submission to Mr. Finley, and at that time I called him and submitted the Ted FioRito band, and the Jack Teagarden and Bob Chester bands.

Mr. Warne: No further questions.

Recross Examination

By Mr. Christensen:

Q. You didn't call Dailard and submit either the Teagarden, Chester or FioRito bands to him first?

A. No, sir.

Q. Always theretofore you had submitted all bands to Dailard first?

A. Not in the case of Paul Martin.

(Testimony of Harold Howard)

Q. With that exception?

A. I had never submitted any bands to Mr. Dailard.

Q. You said there was a change in personnel. Isn't it true that band leaders are always trying to improve their bands?

A. That is correct.

Q. And it is their objective to have as fine a group of musicians and attractions as possible? [960]

A. That is correct.

Q. That is the thing that makes the band, isn't it?

A. That is undoubtedly a contributing thing, very definitely.

Q. Music Corporation of America prepares advertising matter which it distributes in connection with these bands?

A. The leader, in conjunction with the advertising department.

Q. The advertising matter is sent to the ballroom operator promptly upon making of the engagement?

A. That is correct.

Q. That is for publication in newspapers?

A. That's right, part of it.

Q. And the advertising bears the words, "M. C. A. presents"?

A. I believe it does.

Q. You arrange, as often as possible, to have the bands play over the radio?

A. Well, actually that usually is the result of the booking of the engagement, if the particular ballroom or hotel happens to have a radio wire in it, then the band naturally will appear on the air.

Q. For broadcasting purposes?

A. That is correct.

(Testimony of Harold Howard)

Q. Yes.

A. At that time we discussed the percentage arrangement, and I have forgotten the exact percentage which Charlie Barnet was asking, but he felt at that time—Mr. Finley felt that was not a good arrangement for him and he wanted a better price, and pointed out the fact that they would have air time in there, which should be an additional inducement for the band to come in at his figures.

Q. That is more or less an inducement for a band to come into a ballroom, isn't it?

A. I would say it is, yes, sir.

Q. Now, that conversation concerned itself with playing at Casino Gardens only, did it not?

A. That's right. [964]

Q. You, however, did not submit Charlie Barnet to Mr. Finley for an engagement at Mission Beach, did you?

A. No, I didn't submit Charlie Barnet for an engagement. I believe Mr. Finley made his own negotiations on that.

Mr. Christensen: That is right. That is all. Thank you again.

Redirect Examination

By Mr. Warne:

Q. Just a minute. Mr. Finley didn't ask you to book Charlie Barnet into Mission Beach? A. No, sir.

(Testimony of Harold Howard)

Q. He didn't tell you, or, did he say anything about going back to New York to personally negotiate for him to play at Misison Beach?

A. As near as I call recall, Mr. Warne, Mr. Finley said he was going back to New York anyway, and for me to advise Charlie Barnet in a telephone conversation which I was going to have with him that day not to do anything regarding anything until he got back there, and he would call upon him when he was in New York.

Q. But he didn't mention that he was going to try to get him for Mission Beach?

A. I don't believe he did.

Q. You didn't tell Mr. Barnet on the telephone, "Now, don't play at Mission Beach for Larry Finley"? [965]

A. No, sir.

Q. You didn't discuss Mission Beach; is that right?

A. Not that I recall.

Mr. Juan: That is all.

Recross Examination

By Mr. Christensen:

Q. To refresh your recollection, did Mr. Finley say, "Don't tell anybody about my trip to New York because Music Corporation of America would kill the deal if they learned about it"?

A. I don't recall anything of that nature, Mr. Christensen.

Mr. Christensen: That is all.

Mr. Warne: That is all. Mr. Bishop.

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your full name, please?

The Witness: Harold Eames Bishop.

By Mr. Warne:

Q. They call you Ames?

A. They call me Ames.

Q. But it is Eames?

A. It is spelled Eames.

Q. Mr. Bishop, by whom are you employed? [966]

A. Music Corporation of America.

Q. You have been employed by them for approximately how long? A. Approximately eight years.

Q. In what capacity are you employed?

A. Salesman.

Q. Are you an officer of the corporation?

A. No .

Q. You have been employed as a salesman during all of that period?

A. No, for the last seven years my responsibilities have been in the field of sales.

Q. And prior to that?

A. I was—when I first became employed by Music Corporation of America, I was more of an office boy in learning the business.

Q. As a salesman, what are your general duties?

A. My general duties are to contact prospective purchasers of music, to discuss with them available orches-

(Testimony of Harold Eames Bishop)

tras, and to try to arrange a booking that is satisfactory to the orchestra leader and to the purchaser.

Q. Now, when you say "try to find a purchaser" or "try to sell music," what do you mean by that?

A. Well, we have orchestras under management by our organization, and it is our responsibility to offer to those [967] orchestras employment opportunities for their acceptance or refusal. We try to present the offers from purchasers to the band leaders, and then they accept or reject the offers which we have secured for them.

Q. Do you have any particular territory that you work?

A. The territory which I have generally is the entire territory of the Los Angeles office from Denver to the ocean and from Mexico to Canada.

Q. Who is your immediate superior?

A. Mr. Barnet.

Q. He manages the band department?

A. He is the manager of the band department, yes.

Q. A number of other salesmen, as you call them, are also there?

A. There are a number of other salesmen in the department, yes.

Q. Also under Mr. Barnet?

A. Also under Mr. Barnet .

Q. When did you first meet Mr. Finley?

A. I first met Mr. Finley in approximately 1943, in the middle of the year. He telephoned our office at that time, and over the phone he stated that he was interested in the possibility of erecting a ballroom in the vicinity of Burbank, and he asked that a representative of our company call on him in Burbank, which I did. I went

(Testimony of Harold Eames Bishop)

to his jewelry store and [968] discussed with him the possibilities of his ballroom. At that time I think he had a picture of the prospective plants and diagrams of ballrooms. We talked generally about the availability of orchestras, and he was then to advise us when his plans were more definite and he could talk in terms of definite booking procedures. We never heard further from him in regard to the subject of that call.

Q. When was the next time that you met Mr. Finley?

A. The next time that I met Mr. Finley was on the evening of the meeting in the City Council in San Diego, when the bids were considered for Mission Beach. At that time I met him in his ballroom, the Trianon or Radcliffe ballroom.

Q. Let's pick up some of the space in the interim. You know Mr. Wayne Dailard? A. Yes.

Q. When did you first start dealing with Mr. Wayne Dailard in connection with orchestras?

A. Some time in the—around September of 1941. That is an approximate date, that I started servicing Mr. Dailard's account.

Q. At that time he was operating what?

A. He was operating at that time the Pacific Square and also the Mission Beach Ballroom.

Q. You call that servicing an account, or you used a term such as that? [969]

A. The term "servicing an account" means—it is an office term where an individual in our organization is looking out for the bookings in representing our attractions in that particular account.

(Testimony of Harold Eames Bishop)

Q. Are there other accounts that you service, shall we say, in the same way—

A. There are other accounts.

Q. —that you did Wayne Dailard's?

A. That is correct.

Q. Both in Los Angeles and in other places?

A. Both in Los Angeles and all throughout the Pacific Coast area.

Q. Now, had Mr. Dailard been a customer of M. C. A., that is to say, had he bought or had he engaged the services of orchestras prior to that time?

A. He had engaged the services of orchestras prior to that time?

Q. Do you know generally the history of his relationship with M. C. A.?

A. Very generally, up to that time.

Q. You had not engaged for him the services of any orchestras up to about the time that you stated?

A. That is true.

Q. There was some other member of the M. C. A. organization which was handling that account? [970]

A. That is true.

Q. Who was that?

A. I believe it was Lyle Thayer.

Q. There has been introduced in evidence here Defendants' Exhibit E. I ask you if you recall seeing that document before. A. I do.

Q. At the time you started to deal with Mr. Dailard, were you advised that this contract was in existence?

A. At the time of my—the commencement of my relationship with Mr. Dailard, I was advised that there

(Testimony of Harold Eames Bishop)

was a letter of understanding relative to submitting him orchestras first in the San Diego area.

Q. Did you read the letter at or about that time?

A. I never read the letter.

Q. You did not?

A. I have never seen that original letter, no.

Q. You have never seen that original letter?

A. I have never seen that original letter.

Q. Now, do you remember Miss Katleman who testified here as a witness? A. Yes.

Q. Do you remember when she went to work for you?

A. Not exactly. I believe it was some time in June or July of 1941; approximately that time. [971]

Q. Did you ever have a conversation with Miss Katleman in the month of September, October or November, 1941, or December, or at any time, in which she said to you, in substance or effect, "I have read the regulations of the American Federation of Musicians and understand that you cannot have an exclusive booking arrangement with any operator of a ballroom or place of amusement or entertainment. How does it come that you have such arrangement with Mr. Dailard or with Pacific Square?" And did you make the answer, "Well, there are ways of getting around the regulations of the American Federation of Musicians"?

A. No such conversation was had with Miss Katleman at any time.

Q. Now, when was it that you first knew or were advised that Mr. Finley was going to submit a bid for the lease on Mission Beach?

A. I don't recall the exact time. I believe it was approximately, however, the first part of October, some

(Testimony of Harold Eames Bishop)

time right around in there, that I heard Mr. Finley was interested in securing the lease at Mission Beach.

Q. Did you have any conversation with Mr. Finley before he made an offer to the City Council?

A. No conversations were had with Mr. Finley.

Q. Did you have any conversations with Mr. Dailard about Mr. Dailard submitting a bid? [972]

A. Yes, Mr. Dailard advised me that he was anxious to continue on with the operation of Mission Beach, and that he was submitting a bid.

Q. Did Mr. Dailard ever show you the form of bid which he was going to submit? A. No, he did not.

Q. I call your attention to Plaintiff's Exhibit 6, which is addressed to the City Council, and has been read in evidence here, and I ask you to take a look at that. You have examined this document before?

A. At the time my deposition was taken by Mr. Finley's attorneys.

Q. And this is the Dailard bid?

A. That is the Dailard bid.

Mr. Doherty: Refer to the exhibit number.

Mr. Warne: Yes, this is Plaintiff's Exhibit 6.

Q. By Mr. Warne: Did you ever talk to Mr. Dailard or to Mr. Makeland about the form of bid that was to be submitted?

A. No, there was no conversation pertaining to the bid other than the statement that a bid was being made.

Q. As I understand it, you did not know any of the contents of the bid?

A. I had no knowledge of any of the contents of the bid.

(Testimony of Harold Eames Bishop)

Q. Did you ever say to Mr. Wakeland or to Mr. Dailard, [1973] prior to this date of October 30, 1944, or at any other time, that Music Corporation of America controlled 95 per cent of the name bands?

A. No such statement was ever made as to either Mr. Wakeland or to Mr. Dailard. [1974]

Q. Or 95 per cent of the bands that are sold in the amusement business, whether name bands or not?

A. No such statement was made.

Q. By the way, have you got a definition of name bands?

A. The name band, in my opinion, is a group of professional musicians who assume a name and are organized in the business of making music professionally and are recognized as such by the public.

Q. And are there name bands, as you understand it, that are known regionally or locally or at all?

A. Yes; I would say that there are name bands that are known in various areas locally and state-wide, Pacific Coast-wide, and nationally.

Q. Do you know bands that operate in a locality and, so to speak, never get out of the locality? A. I do.

Q. And yet operate under a name? A. I do.

Q. Are they termed name bands in the trade?

A. They are termed, to my knowledge, name bands in the trade.

Q. When was it that you first learned that the William Morris Agency and the General Amusement Company, I believe it was, or Frederick Bros., had told Mr. Finley that they would supply him with bands and orches-

(Testimony of Harold Eames Bishop)

tras at the Mission Beach in [1975] San Diego if he was successful in his bid?

A. I don't recall the exact time that I learned that. Just roughly speaking, I heard that through just general conversation, approximately two weeks—it might have been as long as four weeks—before the bids were to be submitted finally, that the William Morris Agency and the General Amusement Agency had forwarded letters to Mr. Finley advising that they were interested in submitting their orchestras to his proposed operation at Mission Beach.

Q. Had you done business with representatives of these two other agencies on prior occasions?

A. I had done business with those two agencies, also with the Frederick Bros. Agency, on prior occasions.

Q. In your work, generally, with M. C. A., as we call the Music Corporation of America, had you had occasion to contact the personnel of those agencies from time to time? A. That is true.

Q. And did you have conversations from time to time with the personnel of those agencies with reference to the booking of bands by them at Mission Beach under Mr. Dailard's operation, or at Pacific Square?

A. Mr. Dailard was always interested in obtaining the best known bands it was possible for him to have. Occasionally I would call other agencies, either when there was a lower name band available to our organization or there was no [1976] name band or bands of any caliber available for Pacific Square, and ask them if they had any orchestras in the vicinity that were available for booking at Pacific Square; and they would say yes, they did, or no, they didn't. If they said yes, they did, an

(Testimony of Harold Eames Bishop)

arrangement was entered into whereby they were booked at Pacific Square, if it was agreeable with Mr. Dailard.

Q. Did you always get a split commission for doing that? A. Not in all instances; no.

Q. Did you always try to get a piece of the commission in such an instance?

A. I always tried to get a piece of the commission; yes.

Q. You speak of the fact that when you did not have any bands or there were no bands available; what do you mean by that?

A. Well, Mr. Dailard's operation, the policy was to change bands as often as it was possible for bands to be changed; and many times in the handling of the entertainment for his account, or servicing his account, as we call it, we would get up even to two or three weeks before a particular weekend and there would be no bands that our organization could make available for booking at Pacific Square. And at that time I would call all agencies to find out which band, [977] if they had any bands, and if one or two agencies each had a band that was available, which of those bands had the highest caliber I would submit the information on to Mr. Dailard and he would make his decision as to what band to purchase.

Q. How did it come that there would be no M. C. A. bands out here?

A. Well, the bands would be engaged in other sections of the country, or all of the bands that we would have in the Southern California area would be engaged on employment in this area. It was just simply there were just no bands that could be played because they were booked, working at those particular dates.

(Testimony of Harold Eames Bishop)

Q. Some of these bands that were requested might be working in other territories, is that correct?

A. I don't quite understand your question, Mr. Warne.

Q. Well, bands which Mr. Dailard might want to employ and of the caliber that he would want to employ might not be in the Los Angeles territory, do I understand you to say? A. That is correct; yes.

Q. These band leaders and their bands play in various places throughout the United States?

A. They play throughout the United States.

Q. Do you know where the principal market for bands and band leaders in this entertainment is? [978]

A. Well, I wouldn't say that I was an authority on establishing the principal market; but just from the center of population, I would say that probably it would be in the eastern part of the United States.

Q. Were there ever any occasions in the operation of Pacific Square where M. C. A. bands would give way to bands of other agencies?

A. I don't believe, without consulting my records, that I could state here definitely specific instances; but I know that there were instances where a great many bands would be available through other agencies, and a band of lesser caliber was either booked or available through our organization and we would make arrangements to take that band out of Pacific Square, which was our organization, into other employment, so that they would not be deprived of the employment, and have the greater name band to play at Pacific Square.

(Testimony of Harold Eames Bishop)

Q. You say a greater name band and you use the term "a lower caliber" or "higher caliber". What do you mean by that?

A. Well, name bands are of varying denominations in their ability to attract the public; and their attraction to the public also varies according to areas. A band that may be a great attraction here in Southern California and in the Pacific area may not have an attraction in the Middlewest or in the East; it may be localized. And in referring [979] to greater name and lesser name, I am only referring to the bands in this area according to my own interpretation of their name value and drawing power in this area.

Q. Let me ask you this: With reference to booking a band or orchestra into Pacific Square, how long ahead of the playing date would they be booked?

A. We tried to book as far in advance on our orchestras as is intelligently possible to book. I would say that on the average, between six and eight weeks. However, it is not uncommon to have a booking as far ahead as 12 to 16 weeks, if we can project a definite itinerary of an orchestra that far in advance.

Q. When you heard that someone connected with William Morris, Frederick Bros. and these other agencies had submitted letters to Mr. Finley to be used in connection with this bid, did you have any phone conversations with any of them?

A. Yes. I at that time called both representatives of the William Morris Agency and of the General Amusement Agency.

(Testimony of Harold Eames Bishop)

Q. Who did you talk with at the William Morris?

A. At the William Morris Agency I talked with Jack Flynn.

Q. Will you relate the substance of the conversation you had with Jack Flynn?

A. At that time I asked Mr. Flynn or told Mr. Flynn [980] that I had heard that his company had forwarded the letter down to the Finlay Enterprises relative to the support of his endeavors to get the lease. And I told him at that time that according to the information that Mr. Dailard had related to me, that there was little chance of Mr. Finley obtaining, the lease to Mission Beach Park.

Q. Did you mention why?

A. Well, Mr. Dailard had stated to me that his bid, he had been led to believe, was the highest bid that was filed at that time for the operation of the park; and that he felt that his operation in the past was of a satisfactory nature and he saw no reason why the status quo should be upset; and he felt definitely that there was little chance of Finley ever securing the park.

In my conversations with the William Morris Agency—

Q. That is Flynn, again?

A. With Mr. Flynn, I advised him what I had been led to believe by Mr. Dailard; that Mr. Finley was not to secure the park. I told him at that time that it did not appear to me to be sound business for him to be helping Mr. Finley, particularly when there was little chance of him securing the park and there was a chance, if Mr. Dailard found out that he was helping him to secure it, he might be antagonistic toward his future submissions in bands. I told him that we needed, or the bands were

(Testimony of Harold Eames Bishop)

needed for his operation at Pacific [981] Square, and that I hoped that no such relation such as that came up.

Mr. Flynn at that time advised me that he was interested in doing business with both Pacific Square and Mission Beach, and that he would do business with whoever was able to operate at Pacific Square and whoever was able to operate at Mission Beach, and it made no difference to him.

Q. Did Mr. Barnet tell you to make that telephone call?

A. No; Mr. Barnet did not direct me to make the telephone call.

Q. Did you ever tell Mr. Flynn that Mr. Dailard had already obtained the contract from Mission Beach?

A. I never did tell Mr. Flynn that Mr. Dailard had already obtained the contract. Mr. Dailard had represented to me that there was no chance whatsoever of Mr. Finley obtaining the contract, and I reflected that in my conversation to him.

Q. That is, you stated that to him?

A. That is right.

Q. Who was it you talked to at—was it Frederick Bros.?

A. I don't believe that I consulted Frederick Bros.

Q. Was it G. A. C.?

A. It was General Amusement; yes.

Q. Who did you talk to there?

A. I talked with Ralph Wonders, and I also talked with [982] Dick Webster at varying times, continually talking to both of them, both representatives.

(Testimony of Harold Eames Bishop)

Q. All about Mission Beach or in general?

A. In general, about the availability of bands that they had for booking in that area.

Q. Relate the conversation you had with Mr. Wonders.

A. Well, it was substantially the same as the conversation that I had with Mr. Flynn.

Q. That is with reference to your lines. What did he say about it?

A. Well, he told me that he was anxious to see Mission Beach operation flourish in San Diego. He said that he would play his bands with whoever made the highest bids in San Diego; and that was the sum and substance of his answer to me.

Q. You went down there on the occasion when the City Council met, when there was a meeting of the City Council concerning bids, is that correct?

A. That is correct.

Q. Mr. Hal Howard went with you?

A. That is correct.

Q. Drove you down there. Mr. Howard was not present in the Council Chamber?

A. No; he was not.

Q. You were there and a number of other people were [983] there?

(Testimony of Harold Eames Bishop)

A. There was a number of other people in the Council meeting. Actually, I think I got in on about the last quarter of the Council meeting. We did not land in San Diego until around 11 o'clock in the morning, and I would say, all told, I was not in the Council Chambers much longer than 30 to 40 minutes at the most.

Q. Do you recall what occurred there in the Council Chamber while you were there?

A. Do I recall what occurred in the Council Chambers?

Q. Yes.

A. I recall what occurred. I walked in by myself and I took a seat by myself. At that time there was some conversation going on at the Council membership, and subsequently a gentleman stood up somewhere behind me and said that there was a representative of the Music Corporation of America there, Mr. Bishop, and that he thought that some light could be thrown into the matter of the bidding. A gentleman from the City Council stood up and said that there was no need in hearing from a representative of Music Corporation of America; that the only thing that I could testify was that our bands would go to Mr. Wayne Dailard; that Mr. Finley had assured him that he had made all arrangements for all of the name orchestras necessary to the successful operation of Mission Beach Park, and that he could get those bands; and [984] consequently, there was no need in

(Testimony of Harold Eames Bishop)

hearing from any representative of Music Corporation of America. And that was all that was said there. And subsequently, a few minutes after that, the meeting was adjourned and I went on my way.

Q. Had you spoken to Mr. Wakelin or Mr. Dailard or anybody else about going down there and testifying or speaking at the Council meeting?

A. About four or five days before that, Mr. Dailard, in a conversation with me, advised me the exact date that the meeting would be at the City Council. I told him that, as a matter of my own interest, I would like to be present at that meeting, and it was my own decision to be present at that meeting to see what was going on and what the elements in the bids were.

Q. I wonder if you can answer the question I asked you now. Did anybody ask you to come down and make any remarks or make any statements?

A. No one asked me to make any statements?

Q. Did you come there prepared to make any statements?

A. I did not go there prepared to make any statements.

Q. You met Mr. Howard later in the day?

A. I met Mr. Howard later on in the day.

Q. And did you see Mr. Finley later that day?

A. We saw Mr. Finley that evening.

Q. At the Trianon? [985] A. At the Trianon.

(Testimony of Harold Eames Bishop)

Q. Had you seen Mr. Dailard in the meantime, or did you see Mr. Dailard?

A. I saw Mr. Dailard in the afternoon.

Q. Did you see any other customer, if you call them customers, of the places in San Diego?

A. Yes. We went into most of the accounts that we had serviced in the past, such as Sherman's, the Show-Boat, Jimmy Kennedy's place, or two places there; and we covered all the accounts that there was a possibility of doing business with in San Diego that evening.

Q. Well, you saw these other accounts. Did any of them play bands of the caliber—

A. Sherman's plays bands of the caliber of the bands that are submitted to the Trianon or that the Trianon uses. Jimmy Kennedy's, I believe—I have forgotten the exact name; I think it is College Inn—he has two places there. He uses bands of about the same caliber.

Q. And the others were what, cocktail units?

A. The others were small cocktail units.

Q. You had sold units to them from time to time?

A. Units had been sold to them from time to time; yes, sir.

Q. When you went into the Trianon—that is an upstairs ballroom? [986]

A. That is an upstairs ballroom.

Q. When you got upstairs what did you do?

A. We met—there was a gentleman who I hadn't met before, but who Mr. Howard knew, whom he introduced

(Testimony of Harold Eames Bishop)

me to as the manager of the Trianon ballroom. I had a conversation with him for a few minutes. Mr. Howard disappeared. I saw Ken Baker, who was playing at that time at the Trianon ballroom, and I walked across the floor to talk with him and I stepped off the floor to see, to see how many people that the place could properly accommodate, what the capacity of the ballroom was and the dimensions. And then after that, I walked into—I inquired where Mr. Howard was. I walked into the office, where Mr. Howard was with Mr. Finley.

Q. Is Ken Baker one of your bands?

A. Ken Baker is not one of our bands.

Q. Will you just relate everything that occurred, as you can recall it at that time?

The Court: This will be the last question, please.

Mr. Warne: This will be the last question?

The Court: The answer to that question will be a long one and we will hear it this afternoon.

Mr. Warne: Yes, sir.

The Court: We will recess until two o'clock, ladies and gentlemen, and remember the admonition and keep its terms inviolate. Be here at two o'clock.

(Whereupon, a recess was had until two o'clock p. m. of the same day.) [987]

Los Angeles, California, Thursday, February 7, 1946.
2:00 p. m.

The Court: All present. Proceed.

Mr. Warne: If the court please, I am wondering if we can withdraw Mr. Bishop as a witness at this time and put another witness on who is from out of town?

The Court: I think so, unless there is some objection by the other side.

Mr. Christensen: I have none.

Mr. Doherty: In fact, I had in mind, your Honor, calling a witness from out of town and, with your Honor's permission, finishing up with Mr. Dailard so he can go about his business.

The Court: Very well.

Mr. Doherty: Mr. Simpson.

FRED W. SIMPSON,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Fred W. Simpson.

Direct Examination

By Mr. Doherty:

Q. Mr. Simpson, you speak loud enough so I can hear you and I am sure every juror will hear you if I can. Where do [988] you reside? A. San Diego.

Q. How long have you been a resident of San Diego?

A. About 33 years. I came there in 1913.

Q. What business or occupation are you in?

A. I am in the automobile parts and service business?

(Testimony of Fred W. Simpson)

Q. What type of business is that and who do you represent?

A. We represent a division of General Motors called United Motors Service, which is a branch of General Motors Corporation, in their lines; and the Auto-lite Company, which is a division of the Chrysler Corporation.

Q. And how long have you been in that business in San Diego? A. 27 years.

Q. Did you ever hold any public office in San Diego?

A. Yes.

Q. What office was that? A. City Councilman.

Q. And from what time to what date were you a member of the City Council?

A. From 1939, about July, 1939, to June, 1944.

Q. Are you a member at this time? A. No.

Q. How did you come to sever your connections with the [989] City Council?

A. I resigned from the Council to take a position as a director of the newly-formed Water Authority, San Diego. That Water Authority, you know, is to bring in Colorado River water to the San Diego area.

Q. Sort of a water commission? A. Yes.

Q. Or part of Metropolitan Water District?

A. Yes. We expect to annex to Metropolitan Water District of Los Angeles.

Q. Do you hold any state office or position?

A. Yes. I am a member of the Colorado River Board of California.

Q. And by whom is that office named?

A. The Governor appointed me, Governor Warren.

Q. And you still hold that office? A. Yes.

(Testimony of Fred W. Simpson)

Q. Are you familiar with the Mission Beach Amusement area? A. Yes.

Q. Where was your councilmanic district located with respect to that area?

A. I was councilman for the First District, which comprises that area, La Jolla, the beach area, and Point Loma residential area and the Mission Hills residential area. [990]

Q. Is that district composed primarily of residential or industrial business? A. Primarily residential.

Q. And the area immediately adjacent to the Mission Beach Amusement Park, is that also residential?

A. Yes.

Q. What type of residences in there and what class of people reside in that area?

A. Most of the people are older, a large percentage are retired people that live at Mission Beach, in the residential area of Mission Beach.

Q. Do you know Mr. Wayne Dailard? A. Yes.

Q. How long have you known him?

A. About 15 years, I think.

Q. When did you first become acquainted with Mr. Dailard?

A. Oh, about 15 years ago. I got well acquainted with him during the World Fair that was conducted in Balboa Park at San Diego during the years of 1935 and '36.

Q. What connection did he have with the World's Fair? A. He was the manager.

(Testimony of Fred W. Simpson)

Q. And what did you know about the Mission Beach Amusement area during the time that you were councilman, before Mr. Dailard secured a lease? [991]

A. Well, I know that when I went on the Council, the operation at Mission Beach, which was then operated by the city, was very poor; it was very unsatisfactory to the City officials, at least.

Q. In what respect was it unsatisfactory?

A. Oh, the sanitary conditions around the area were very bad, poorly managed, and apparently, incompetent management.

Q. Were you a member of the Council at the time that the City Manager made a lease with Mr. Dailard?

A. Yes, sir.

Q. How often would you visit the Beach, the ballroom, and the Beach recreation area? When I say the Beach, I mean Mission Beach, on the average while you were a councilman?

A. Oh, I would say three or four times a month.

Q. What times, what hours would you visit?

A. Well, occasionally I would go in the evening, usually in the afternoon, but whenever I had occasion to go to public functions and one thing and another at the ballroom in the evening, I would attend.

Q. Did you go into the ballroom during the time that they had dances there? A. Yes.

Q. And also, about the park? [992] A. Yes.

Q. You know what hard liquor is, don't you?

A. Yes. [993]

Q. I mean whiskey, gin, distilled spirits?

A. Yes.

(Testimony of Fred W. Simpson)

Q. During Mr. Dailard's operation of Mission Beach was there any hard liquor or any mixed drinks, to your knowledge, sold in the ballroom? A. No.

Q. Was there any hard liquor in any form, while Mr. Dailard had the operation of Mission Beach, sold in the area under his jurisdiction? A. No.

Q. Was there a beer concession there? A. Yes.

Q. Was there any hard liquor sold in bottles, that is, in the original package in the Mission Beach area under Mr. Dailard's jurisdiction, in any form? A. No.

Q. Now, during the operation of Mr. Dailard, did you have complaints respecting the Mission Beach Amusement Park from the citizens of your district?

A. Well, there were some complaints from the residents in the area, people that wanted to live quiet, they did not want the noise of the Amusement Park in the area at all. I have had those kinds of complaints, if you want to call them complaints.

Q. What was the position or attitude of those people [994] who complained to you?

A. That they didn't want the noise attendant to an amusement park so near to where they live.

Q. What did they want done with the property?

Mr. Christensen: That is objected to as calling for hearsay, and I object on that ground.

The Court: The way it is framed, it does. The objection is sustained to the question.

Q. By Mr. Doherty: I will get at it this way, Mr. Simpson: You have just testified that you had complaints from people who objected to its being run as an amusement park. Did these people have any objection

(Testimony of Fred W. Simpson)

or express any objection to the method of operation by Mr. Dailard?

Mr. Christensen: That is objected to as calling for a conclusion and opinion, and on the further ground it calls for hearsay.

The Court: I think so. We will be getting into collateral matters. Sustained.

Mr. Doherty: May I make one inquiry of your Honor?

The Court: Yes.

Mr. Doherty: Plaintiff's testimony was from the mayor and two councilmen, that they had received numerous complaints from the citizens about Mr. Dailard's operation. It is only directed to that point.

The Court: The ruling still stands. [995]

Mr. Doherty: Pardon me, your Honor?

The Court: The ruling still stands.

Q. By Mr. Doherty: Mr. Simpson, did you observe during Mr. Dailard's operation anything about it which caused you to be critical or complain respecting it? I am speaking of you as a city official.

A. Would you please repeat that question?

Q. I probably did not state it as accurately as I might. As a member of the City Council, in your inspection of the Mission Beach area under Mr. Dailard's jurisdiction, what complaint, if any, did you have to make respecting the method and the manner of his operation?

A. I had no complaint.

Q. Did you receive any other complaints respecting the operation other than from the people in the area that

(Testimony of Fred W. Simpson)

you have spoken of who wanted it abandoned as an amusement park?

A. Yes, I had two written complaints. They were—the first one was because Mr. Dailard's operation had rented the ballroom to a colored organization to conduct a colored band, and they allowed white people in with the colored people in the ballroom at that time. That was a complaint I had received in writing.

Then I had another one, which was directly opposite, a complaint from some people because Mr. Dailard would not allow the use of the ballroom to another colored organization for the [996] same purpose, because of the complaints, I presume, he had on the first one.

Q. Were those the only two complaints you received respecting Mr. Dailard's operation for the five years you were councilman?

A. Yes. There were, of course, some, as you usually have in a position of that kind, when Mr. Dailard first took it over, and I didn't pay any attention, very much attention to them, because I charged them to jealousy, from people that wanted—they had had the management of the place, they were in the City employ previously, and I presume they were just disgruntled because they didn't have the management any longer.

Mr. Christensen: May that be stricken as his opinion or conclusion?

The Court: No, I think it will stand. Motion denied.

Q. By Mr. Doherty: Had you finished your answer, Mr. Simpson? A. Yes.

Q. Who preceded Mr. Knox as mayor of San Diego?

A. Immediately, Dr. Bard.

(Testimony of Fred W. Simpson)

Q. For how long did he serve?

A. He served from the time of the death of the late Mayor Benbough, and I don't remember exactly the date; I believe it was in November of 1943; in November, as well as [997] I can remember it. It was along about there.

Q. He served just in the interim period until the election was called? A. Yes.

Q. How long had Mayor Benbough served as mayor?

A. I think he was first elected in 1935, and then reelected and did not finish the second term.

Q. You, of course, knew Mayor Benbough?

A. Very well.

Q. And were you a member of the City Council during the various terms of office? A. Yes.

Q. Did you receive any complaints from other members of the Council respecting the operation of Mission Beach by Mr. Dailard during any of your term of office?

A. Yes. When the present Mayor Knox was councilman, he complained not of Mr. Dailard's operation, but of the papers strewn on the beach in front of the Amusement Center.

Q. Did you hear any comments or statements by Mayor Benbough, or other members of the Council, respecting the efficiency or lack of efficiency that Mr. Dailard evidenced in the operation of the lease?

A. No. Most of the expressions I heard were very complimentary to Mr. Dailard at that time.

Q. I believe, Mr. Simpson, you had an ambition to be [998] mayor of San Diego?

A. That is correct.

(Testimony of Fred W. Simpson)

Q. And you ran against Mayor Knox?

A. That's right.

Q. And you were defeated? A. That's right.

Q. Who was your campaign manager?

A. Mr. Dailard.

Mr. Doherty: Cross-examine.

Mr. Christensen: No cross-examination. Step down.

The Court: That is all, Mr. Simpson.

Mr. Doherty: I will call Mr. Dailard.

WAYNE W. DAILARD,

called as a witness by and on behalf of the defendants,
having been previously duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Doherty:

Q. Mr. Dailard, you have already been sworn and testified in this case. I believe you have testified previously, in substance and effect, that you took over the Mission Beach some time, I think, in either 1940 or 1941?

A. That's true.

Q. During the time that you operated at Mission Beach what hard liquors, in the sense of hard liquors I mean distilled [999] spirits, whiskey, gin, and so forth, were served in the ballroom at Mission Beach?

A. None.

Q. During the time that you operated Mission Beach what hard liquors in any form, container or otherwise, mixed or otherwise, were sold or served in and about the Beach area under your jurisdiction? A. None.

(Testimony of Wayne W. Dailard)

Q. What form of drinks, while you were operating the ballroom, were served in the ballroom during your operation?

A. Soft drinks, bottled soda goods. I think at one time during our period there was a soda fountain that operated. I think in later years that was reduced to bottled goods only; that is bottled soft drinks.

Q. Was there any beer served or sold in the ballroom—

A. No, sir.

Q. —during your operation at any time?

A. No, sir.

Q. Was there any wine served in the ballroom?

A. No, sir.

Q. Was there a beer concession on the Beach area or the Recreation area?

A. Yes.

Q. What did they sell at that concession?

A. Beer and wine. [1000]

Q. Original packages or—

A. Over the counter.

Q. Over the counter?

A. Or over the bar, whatever you want to call it.

Q. Mr. Dailard, you are familiar with the population trend in San Diego from 1940 up to 1945?

A. Yes, sir.

Q. What was the official population figure for San Diego in 1940?

Mr. Christensen: To which we object as not the best evidence.

The Court: I suppose in a sense there has been an enumeration, Major.

Mr. Doherty: I would say that is correct, your Honor.

(Testimony of Wayne W. Dailard)

The Court: You ought to be able to stipulate on that, gentlemen.

Mr. Christensen: Yes, I have the figures.

The Court: That should not require testimony.

Mr. Doherty: Let me see if you have the figures that Mr. Simpson told me.

Mr. Christensen: No, I don't have those.

(Thereupon a document was handed to counsel.)

Mr. Doherty: I will take your figure here for the population for 1940, which is almost what Mr. Simpson told me, about the same, but I cannot accept all the other pages of [1001] figures of your breakdown.

Mr. Christensen: Then you get yours, will you, please, sir?

The Court: The objection is sustained.

Q. By Mr. Doherty: Mr. Dailard, was there a pronounced increase in population beginning with 1940?

A. Yes.

Q. Consisting of what classes of people?

A. Service people and aircraft workers.

Q. From your observation there, to what extent did the population increase during the four years from 1940 to 1944, inclusive? That would be five years.

Mr. Christensen: To which we object as calling for a conclusion and opinion, and not the best evidence.

The Court: That is true. There was an enumeration there last year, as I remember. That is available, of course.

Mr. Doherty: It was only an informal enumeration, your Honor, as compiled by some organization there, and no more official than any other layman's.

(Testimony of Wayne W. Dailard)

The Court: I think it was semi-official. As I recall, it was a semi-official enumeration.

Mr. Doherty: If your Honor would give me the statement of what it was, I would accept it as evidence.

The Court: I cannot do it from the bench. I have a memorandum in chambers, I think, that could be referred to. [1002]

Q. By Mr. Doherty: Were there not a great number of more people around the streets than there were when you first took over the concession? A. Yes, sir.

Q. Do you know whether or not there was any increase in the police force? A. No. [1003]

Q. Do you know whether or not, from your own observation and knowledge, some of the policemen were taken into the Service?

Mr. Christensen: Well, that is objected to as calling for his conclusion and opinion.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Oh, I think that is a matter of such common knowledge that anyone who is familiar could express a view. Objection overruled.

A. Yes.

Q. By Mr. Doherty: Was there any other increase in the police force? A. Not that I know of.

Mr. Christensen: To which we object as calling for his conclusion and opinion, not the best evidence.

The Court: Yes, that is a matter of record, of course. Sustained. He said, not that he knew of, anyhow, so that would not be evidential.

(Testimony of Wayne W. Dailard)

Q. By Mr. Doherty: Under your observation of the conditions in San Diego from 19—we will say—43 and '44 was there an apparent increase, we will say, in drunkenness? A. Yes.

Q. And was it confined to any particular area?

A. No. [1004]

Q. And would that condition sometimes evidence itself at Mission Beach? A. Yes.

Q. Would it be consistent, or periodical, or a hit or miss? A. Apparently in cycles.

Q. What do you mean by that?

A. There would be periods of very good deportment on the part of people attending, and for periods of four and six weeks, and then there would be two or three days and weekends where there would be rowdy groups, ten or 12 in a group, defense workers, or of servicemen, that would come in and they were drunken.

Q. What steps did you take to correct that?

A. Well, our first appeal, naturally, was to the Police Department for help.

Q. And what else did you do?

A. Appealed to the Shore Patrol, if the offenders were service people.

Q. Did you make any complaint to any City official?

A. Yes.

Q. To whom? A. The City Manager.

Q. And who was City Manager at that time?

A. Walter Cooper. [1005]

Q. And what did you report to him?

A. Well, we reported to Wally that under our lease the responsibility of the policing of Mission Beach was

(Testimony of Wayne W. Dailard)

the City's; and we merely asked him to fulfill their part of our agreement; that was to give us adequate police protection when we needed it and called for it.

Q. And what did Mr. Cooper tell you?

A. He said he hadn't—

Mr. Christensen: That is objected to as hearsay.

The Court: Well, I think so. Mr. Cooper is dead. Sustained.

Q. By Mr. Doherty: When was Mr. Cooper killed, if you know, Mr. Dailard?

A. In December, I believe, of 1943—no; 194—

The Court: 4.

A. —4, that is correct. Thank you, sir.

Q. By Mr. Doherty: He was killed in an airplane accident out here near Lockheed Airport?

A. That is correct.

Q. Were any steps taken by the City or Mr. Cooper, if you know, to remedy the situation?

A. None that were ever apparent. At one time, they had—I don't know the exact dates, but along some time in 1942 they took out the patrolman that we had assigned to the park. They had two men there, if my memory serves me correct- [1006] ly on about 16-hour shifts. They pulled those men out and there was a time we had no protection. During that period we employed bonded policemen.

Q. Who employed them? A. We did.

Q. And who paid for them? A. We did.

Q. For what purpose?

A. For patrolling the grounds, attempting to keep order.

(Testimony of Wayne W. Dailard)

Q. There has been some testimony here about the bath house being turned into a brig. Do you know anything about that?

A. Yes. My partner, Mr. Wakelin, and myself arranged with, I believe, Commander Gallagher, who was in charge of the Shore Patrol at that time. The problem we had to meet was this: That the City prowler car would drop in a time or two during the evening and if we had servicemen, that their deportment was bad, the only thing the prowler car could do was to ask these boys to leave the grounds. In other words, the one prowler car during that particular period of time was covering La Jolla, Pacific Beach, Mission Beach, Ocean Beach and parts of Point Loma; and the logic behind it was that if they were tied up, taking some disorderly service people into San Diego to book them, that the entire area out there constituting probably a half of San Diego's population was without a patrol car. So, [1007] to meet that—I think the Chief of Police had considerable hand in it—we created our own brig. I say “we” meaning the three forces, the Chief of Police, the Navy and the management of Mission Beach. That was simply to detain those fellows until the patrol wagon could come and pick them up, the patrol wagon or the Navy patrol.

Q. In other words, the bathhouse was then used as a sort of temporary holding spot?

A. Yes. The bathhouse was selected because the Navy was patrolling the entire plant, anyway, for the training of their recruits; so, really, the entire building was under Navy management.

(Testimony of Wayne W. Dailard)

Q. That was pursuant to arrangement, you say, with the Navy and the Chief of Police?

A. That is correct.

Q. How long did that continue?

A. I think it still continues. At least, it was in effect up to the time our lease expired.

Q. There was some testimony here by, I think, Mayor Knox that you had a meeting with him. Do you remember the approximate date?

A. The only meeting on the subject of Mission Beach was early in the spring of 1944.

Q. Who was present at that time?

A. Mr. Cooper. [1008]

Q. The City Manager? A. Yes, sir.

Q. What were the circumstances under which you had this meeting?

A. There was a dual circumstance. Mr. Cooper wanted to see any existing agreements that we had or agreement that we had with the Music Corporation, knowing that the lease was coming up for some sort of a renewal the following year. My purpose in requesting the meeting was to attempt to persuade the City Manager to extend my then existing lease through the year 1945.

Q. And where did you meet?

A. The meeting started, as I recollect, in Mr. Cooper's office, which was on the second floor, I believe, of the Civic Center Building.

Q. And where did you meet with the Mayor?

A. I don't remember the details, but it seems to me that the Mayor came in and that we all went up to his office, up in the penthouse on the Civic Center Building. Now, that couldn't—it could have been in some other

(Testimony of Wayne W. Dailard)

manner, but the contact with the Mayor was established after I got in the meeting with Mr. Cooper.

Q. And did you discuss the lease and extension?

A. The first thing, we analyzed the agreement. Mr. Cooper had never been familiar with the type of arrangement [1009] we had on the booking of our bands. He read the agreement and explained it to Mayor Knox. It is my recollection that Mayor Knox did not read the agreement but there was some discussion of it. Cooper pointed out to him the type of an arrangement that we had; that it was an optional agreement having a—after he read it, he explained it to the Mayor.

Q. During that conversation with the Mayor what complaint, if any, was made by him respecting the method or the manner in which you had been operating Mission Beach Park?

A. There was no complaints. He was opposed to extending the present lease, but at that time it was not on a basis of any complaints.

Q. Did he give the reason why he opposed the extension of the lease?

A. His reason at that time was that he felt that if it was continued, if the City decided to continue Mission Beach as an amusement park and not develop it into a recreation center—there was a great deal of talk at that time of turning it into a Jones Beach idea, making it a recreation center for shuffleboard and taking out the carnival and the midway atmosphere. At the time that Mayor Knox and I discussed it, he said he had not made up his mind what his stand would be on it, but if it were leased, that he definitely would put it up to bids; that he would not extend [1010] my present lease.

(Testimony of Wayne W. Dailard)

Q. Did you have any further conversations with the Mayor respecting it at any time?

A. I don't recall of any. There might have been a casual discussion of it at Rotary Club or something of that type, but I do not remember of any specific meeting on that part, and I feel that I would have remembered had we had it, or my appointment book would show it.

Q. Mr. Austin, a City Councilman, and Mr. Crary, a City Councilman, testified here. What complaint, if any, did they ever make to you respecting the manner or method in which you were operating Mission Beach?

A. Well, none that I know of. I don't know that I have ever met the senior Mr. Austin. I may have, years ago. Mr. Crary has never registered any complaint with me. I am sure he did not. I only remember of having met the man on one occasion.

Q. What is the answer to my question: What complaint if any, did they make to you?

A. To me, none.

Q. You filed a bid, did you not, for Mission Beach?

A. Yes, sir.

Q. And after you filed that did you contemplate going through with it or withdrawing it?

A. We officially—we started to withdraw it. As a [1011] matter of fact, we made the announcement to the press that we were withdrawing it.

Q. What reason did you have for wanting to withdraw it? A. We sensed—

Mr. Christensen: To which we object as being immaterial to any issue here, self-serving.

The Court: Overruled.

A. We sensed a political opposition and—

(Testimony of Wayne W. Dailard)

Mr. Christensen: I ask that that be stricken as a conclusion and opinion of the witness.

The Court: You were asked that question, Mr. Dailard, and then you use the plural first person pronoun in answering it. I think that would not be in answer to the question.

A. I sensed a political reaction. And may I explain at this time, that the Mission Beach, the profit that I derived personally from Mission Beach meant very little to me in dollars and cents, inasmuch as I had to consider it as added income. My own ventures, such as I had mining interests, I had Pacific Square, and my ranch were considered first revenue, because I owned those properties. In the \$35,000 to \$40,000 yearly that I derived from Mission Beach I only retained probably \$3,200 of that; and I had come to the point of thinking where the amount of money that I retained was not worth the petty political battle to get it.

Now, that was my thinking at the time that we announced [1012] our intentions to withdraw.

Q. By Mr. Doherty: Did you have a conversation with the City official respecting your intention?

A. Yes.

Q. Who was that? A. Walter Cooper.

Q. At that time City Manager?

A. That is correct.

Q. Now, you can't say what Mr. Cooper told you. But you did have a meeting with him? A. Yes.

Q. And after that meeting what decision did you come to?

Mr. Christensen: Now, that is objected to as being immaterial to any issue here, self-serving.

(Testimony of Wayne W. Dailard)

Mr. Doherty: I withdraw it.

Q. Just make your decision. What decision did you come to respecting the letting the bid stand or withdrawing it after your conversation with Mr. Cooper?

A. After our conversation with—after my conversation with Mr. Cooper, I decided to leave the bid stand.

Q. In that conversation with Mr. Cooper—don't try to answer this until his Honor has a chance to rule, because it may come within a forbidden topic. In this conversation with Mr. Cooper what, if anything, was said by him respecting [1013] the probability of you being awarded the bid?

Mr. Christensen: To which we object as calling for hearsay.

Mr. Doherty: It is only leading up to the Ames Bishop conversation, your Honor.

The Court: Well, I think probably it is admissible. The witness is charged as a co-conspirator here and he has a right to put before the jury his situation. The fact that Mr. Cooper is dead, I do not think should prevent him from revealing his attitude to the jury. Objection overruled.

The Witness: Will you read the question again, please?

(Question read by the reporter.)

A. Mr. Cooper told me at this meeting that he had just finished a private checking or investigation of Mr. Finley; he had also analyzed the relationship of the two bids. He said, in his opinion, the bids were so closely identified as to terms, even though ours was a bit greater, that in normal procedure it would be referred to him for

(Testimony of Wayne W. Dailard)

decision; that in any other closely-knit proposals that had been offered to the City, that procedure had been followed by the Council; it had simply been referred to him for decision.

He said, "While I am not giving you any preference, only insofar as your ability and financial standing and record merits it," he says, "I can't understand how the administration can award a political football, as it were, to a man who has [1014] not had a sufficient background in the business. It would be too dangerous."

He said, "I want you to leave your bid in. It, in all probabilities, will be referred to me, and I certainly shall not award it any other way than to the most reliable and the better experienced bidder."

Now, that was the basis. That is not verbatim, but that is the substance of the conversation.

Mr. Christensen: I ask now that that be stricken as hearsay. I am absolutely unable to cross-examine or to refute it, and it is apparently hearsay.

The Court: The motion will be denied. You are unable to produce Mr. Cooper, that is true, but that should not foreclose the witness whom you have charged with being a co-conspirator from giving to the jury his version concerning the reasons for the submission of the bid.

Mr. Christensen: Your Honor has in mind the fact the bid has already been submitted when this conversation took place?

The Court: Yes. The bid itself, within its four corners, is not the subject matter of the inquiry. The subject matter of the inquiry is his attitude and relation with respect to the submission of that bid.

Mr. Doherty: May I proceed, your Honor?

(Testimony of Wayne W. Dailard)

The Court: Yes, sir.

Q. By Mr. Doherty: Mr. Dailard, after this conversation [1015] with Mr. Cooper, the City Manager, did you have a conversation with Mr. Ames Bishop, the defendant in this case?

A. Yes; I called Mr. Bishop. I don't remember the—I know that I called him for some other cause. I called him and told him in substance, I told him that our chances were very much improved in obtaining the lease on the Beach; that, as a matter of fact, it looked very, very good at that time.

Q. Mr. Dailard, you have already testified respecting the profit from the operation for 1941, '2, '3 and '4 from Mission Beach. I am handing you your records, and you give me the answers from those documents.

Mr. Christensen: Have you shown those to me at any time heretofore, Mr. Doherty?

Mr. Doherty: No, I have not. He has testified to the totals in response to your inquiries, and I am only having him look at them rather than have him give his estimates. Now, if you wish to examine them or stand by him when he checks them, it is agreeable to me, and you can have access to them, because the inquiry I am going to make has already been testified to in part and I just want to break it down into different headings. I will ask the first question and then your Honor will get the trend.

Q. Have you before you, Mr. Dailard, the records showing the amount of income, gross income, from the ballroom for the year 1943? [1016]

A. Yes, sir.

Mr. Christensen: Just a minute. May I ask the witness on voir dire a question?

(Testimony of Wayne W. Dailard)

The Court: Yes, sir.

Q. By Mr. Christensen: Those are not the books of the original entry, are they, that you have?

A. No. They are statements.

Q. You do have the books of original entry?

A. Yes; we have them.

Q. They are not here in court, are they?

A. I don't think so.

Q. They are not here available to my inspection, are they? A. I don't know.

Q. You did not yourself prepare that?

A. No, sir.

Mr. Christensen: I object to its use.

The Court: It has not been used yet. I am not anticipating anything. It has not been used yet, Major. I am not making anticipatory rulings in this case.

Q. By Mr. Doherty: Independent of the memorandum you have in front of you, Mr. Dailard, do you know approximately what the gross income from the ballroom was for the year 1943?

A. For the year 1943? [1017]

Q. Yes. No; you can't look at your memorandum.

The Court: He has asked you if you have an independent recollection. If you haven't any, why, say so.

A. No .

Q. By Mr. Doherty: Can you tell me the amount of income from the ballroom for the year 1944?

A. Approximately 153,000.

Q. And what were your total expenditures chargeable to the ballroom for 1944?

Mr. Christensen: We submit it is not the best evidence, the better evidence being available, as disclosed.

(Testimony of Wayne W. Dailard)

The Court: There is better evidence; that is true. He has a set of books and he kept them, and on the strength of those he did business and undoubtedly made his fiscal returns to the appropriate agencies.

Mr. Doherty: I will have to have Mr. Dailard step aside, and I will see if I can get his books here for counsel.

Mr. Christensen: Would you like me to cross-examine on the matters and things you have heretofore inquired about?

Mr. Doherty: Yes. Proceed up to the present time, and we will finish the other off later.

Cross Examination

By Mr. Christensen:

Q. Mr. Dailard, Mr. Cooper was the City Manager at the time Mr. Finley was awarded the lease on Mission Beach, wasn't [1018] he?

A. That is correct, sir.

Q. And he is the one that awarded it?

A. No; I don't think he had any voice in it, Mr. Christensen.

Q. Did you notice whose signature was signed to the lease?

A. No. It was never referred to him, I know that.

Q. How would you know that?

A. Matter of record.

Q. What record are you referring to?

A. The Council record.

Q. Have you the Council records?

A. No. You asked me how I knew it. I told you "a matter of Council records".

(Testimony of Wayne W. Dailard)

Q. All right. Tell me, these were sealed bids that you and other bidders were required to make, weren't they?

A. Yes.

Q. To be opened on November the 8th of 1944?

A. That is correct. That is correct.

Q. Oh, yes. You told us about all your other interests. Will you tell me what other interests you had during the year 1944?

A. For the year 1944?

Q. Yes, sir. [1019]

A. I was operating the ranch.

Q. Where was the ranch, sir?

A. El Cajon Valley.

Q. Briefly, what kind of a ranch was it in size?

A. We raised fur-bearing sheep, Curacao sheep.

Q. What size ranch?

A. We had 34 acres that we owned and we had some 370 acres lease.

Q. Now, the ranch and what other interests?

A. There was a period. What year did you say?

Q. 1944, sir?

A. There was a period in which we were in what was known as the Collonades Corporation, operating Casino Gardens.

Q. When were you in that?

A. Some time, as I remember, during the spring and into the fall of 1944?

Q. How long were you there?

A. I can't answer that. It was—I can't answer it accurately. As a guess, I would say from April to September.

(Testimony of Wayne W. Dailard)

Q. And continue now?

A. And we had Pacific Square, Limited, and Mission Beach.

Q. What else?

A. Well, that was the only direct operational.

Q. You told us about the other sources of income and [1020] other interests. Will you continue?

A. That was through interests in other business. I had some mining stock at that time.

Q. Just mining stock, you say? A. Yes.

Q. Did that require any of your attention?

A. Some, yes.

Q. And you had some polo ponies, too?

A. Yes.

Q. That required some of your attention?

A. Yes, sir.

Q. What else? A. That is all I can think of.

Q. You actually spent a very small percentage of your time at Mission Beach, didn't you? A. Yes.

Q. Not over, say, ten per cent? A. About.

Q. And you say that the income derived from the operation of Mission Beach was a minor consideration to you?

A. I did not say it was a minor consideration.

Q. Well, I might have characterized it as that, but you correct me and tell me what it was.

A. I simply stated a very plain tax fact which is manifest in the figures that you have in your possession. [1021]

Q. Well, go ahead and tell me, sir.

A. What do you want to know?

(Testimony of Wayne W. Dailard)

Q. That income was of little importance to you, then?

A. Correct, sir.

Q. Now, you know, of course, Mr. Dailard, that there has never been any jail or place of detention at Mission Beach Amusement Center since Mr. Finley had the place, don't you?

Mr. Doherty: Not proper cross-examination.

A. I don't know.

Mr. Doherty: Object on that ground.

A. I didn't make that statement. I said I knew it was in operation up to the time that our lease expired. [1022]

Q. Well, it was there while you had it, though?

A. I testified to that.

Q. Yes. Now, tell me when did you have these, as you call them, bonded policemen, Mr. Dailard?

A. Intermittently throughout the time of the operation. That would take a check of the records. We did business first with Mr. Sheridan, who had the bonded police patrol. I would say that was intermittently throughout the life of our agreement. I think our records would substantiate that.

Q. What do you mean by "intermittently"?

A. During the peaks of the operation, or during periods when they were needed, when the City was not able to furnish us with the proper protection.

Q. You did, however, appeal to the City authorities for police protection there, didn't you? A. Yes.

Q. You did that on a great number of occasions, didn't you?

A. I know—I feel confident that my partner did. I know that on at least four occasions that I made—and

(Testimony of Wayne W. Dailard)

I think they ran from the last, the end of the summer of 1943 up through the summer of 1944, that I personally talked with Mr. Cooper about it.

Q. That was on account of fighting and intoxication?

A. Yes. [1023]

Q. On account of morals conditions, too, was it?

A. Not that I know of.

Q. You permitted hard liquor in the park there, did you?

A. Well, not—no more than you would permit hard liquor in the court room. We sold no hard liquor. Whenever we saw any evidence of it we had it removed.

Q. You knew it was there though, didn't you?

A. Not of my own knowledge, I do not. Any more than at 5th and Broadway. I saw bottles at 5th and Broadway downtown. I saw them carrying them in their hands.

Q. Now, you spoke of the Senior Mr. Austin. To whom are you referring?

A. Mr., I believe, Walter Austin.

Q. He is a member of the City Council, is he?

A. Yes.

Q. At that time they had two Mr. Austins, they had Walter Austin and—

A. And Mr. DeGraf Austin.

Q. And Mr. DeGraf Austin?

A. That is correct.

Q. And when you mentioned the Senior Mr. Austin you were thinking of Mr. Walter Austin? A. Yes.

Q. I see. You were not referring to any person who has [1021] been here in the courtroom, either as a witness

(Testimony of Wayne W. Dailard)

or otherwise, when you said the Senior Mr. Austin, were you?

A. I think Mr. Walter Austin was here the first day, was he not? I am asking you. I was not here.

Q. Well, I didn't see him.

A. I have understood from reading the transcript that he did testify here. Does that answer your question?

Q. You have read the transcript? A. Yes.

Q. When did you do that?

A. I don't know; I don't know. Wednesday.

Q. You mean you were reading over your testimony?

A. Yes.

Q. And the testimony of other persons who have appeared here? A. Yes.

Q. And, of course, you discussed what you would be asked— A. Certainly.

Q. —and what answers you were going to give?

A. Certainly.

Mr. Christensen: That is all. Thank you, sir.

Redirect Examination

By Mr. Doherty:

Q. Mr. Dailard, do you know Mr. Warner Austin? [1025] A. Yes.

Q. How long have you known him?

A. Why, I met Mr. Warner Austin for the first time in the World's Fair of 1934.

Q. You have known him ever since?

Mr. Christensen: To which we object as not proper re-direct.

The Court: Overruled.

The Witness: Yes.

(Testimony of Wayne W. Dailard)

Q. By Mr. Doherty: What was his occupation or calling before he went to work for Mr. Finley, if you know?

A. He was a city fireman.

Q. Employed by whom?

A. The City of San Diego.

Q. A uniformed fireman? A. Yes, sir.

Q. How long had he held that position, to your knowledge?

A. To my knowledge, he held it, and I have a knowledge because he used to inspect—used to be, at least in uniform, in Pacific Square for, I would say, at least six or seven years out of the ten years that I have known him, or rather, the eleven years that I have known him.

Mr. Doherty: That is all. [1026]

Recross Examination

By Mr. Christensen:

Q. He booked two of his bands in there to play at your Mission Beach Ballrooms?

A. Of his bands?

Q. Yes. A. Did he have bands?

Q. Will you answer the question, instead of asking one?

A. Not that I know of. I know that he booked a mortuary girls' band; that he was working for a mortuary that had a little girls' band, and they called them the Merkeley Maids, and he booked them, not with us, but through some local organization to play in Pacific Square, yes.

Q. You know he had two bands, don't you?

A. I do not.

Q. You know he was a lieutenant in the fire department?

A. I didn't know that.

Q. And that his job was that of public relations, do you not?

A. It wasn't when I first knew him.

(Testimony of Wayne W. Dailard)

Q. When was that?

A. During the 1934 World's Fair. He was a fireman sitting in front of the fire-house.

Q. Well, after that? A. I don't know. [1027]

Q. You never saw him after 1934?

A. Yes, I saw him.

Q. Don't you know that his job was—

A. I said, "No."

Q. You don't know that? A. No.

Q. Have you made any effort to learn?

A. No, sir.

Q. You know that he organized at least 1500 shows for the U. S. O., don't you?

A. I didn't know that.

Q. You are not very well acquainted with him, are you?

A. I know the man. I answered the questions as they were asked me.

Q. Do you know that he has a license as a broker?

A. I didn't know that.

Q. Didn't you know that? A. No.

Mr. Christensen: All right. Thank you.

Redirect Examination

By Mr. Doherty:

Q. When did you last see him in a fireman's uniform about Pacific Square?

A. It seems it was after the first of the year. No, it was in the fall, I believe, of '44. [1028]

Q. Of 1944? A. I think so, yes.

Mr. Doherty: That is all.

Mr. Christensen: That is all.

Mr. Warne: Mr. Bishop, will you resume the stand?

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Warne:

Q. Mr. Bishop, at the time we recessed for the noon recess we had just arrived, I believe, in Mr. Finley's office in the Trianon Ballroom. It was in an office there?

A. That's right.

Q. And Mr. Howard was there, yourself, and Mr. Finley, and you believe there was some other party; is that correct? A. That is correct.

Q. Now, just relate what was said by you, Mr. Howard, Mr. Finley, and what transpired there, as you now recall?

A. As I recall, when I walked into the office Mr. Finley stated, "Well, now that"—I don't recall whether he stated that he had Mission Beach or that it looked as though he was going to have Misison Beach, but he said, "What about bands?" And I explained to him at that time that we had a [1029] contract calling for first refusal of our orchestras with Pacific Square, and that in the event there were orchestras available for him in addition to those to supply the Pacific Square, we would be happy to submit those orchestras to him. I told him that I was very skeptical about the supply of orchestras for the two ballrooms because we were even having considerable difficulty supplying calibre bands for the Pacific Square operation.

Mr. Finley at that time said, "The prices, as I understand it, that you are charging at Pacific Square are

(Testimony of Harold Eames Bishop)

considerably out of line, so far as the value of the bands are concerned," and he said, "If and when you are going to do business with me, you are going to do business with me under my terms, under the prices that I consider as the value of the orchestras."

I explained at that time to Mr. Finley that so far as the price on the orchestras, the price on orchestras was one which was set by the orchestra, and they would either accept his contracts, when and if we made one, or would refuse them in their own right. I at that time advised Mr. Finley possibly if he were operating in the areas of Burbank or in Oakland, that there would be an availability of orchestras in that area for a similar operation.

I think that, in sum and substance, is about the entire conversation I had with Mr. Finley at that time. [1030]

Q. Well, did it all happen in the sequence you have given it here?

A. It might not have been in the exact sequence in which I have given the discussion here, but that is my recollection right now of the conversation with him.

Q. Well, let me ask you this: Was there some kind of salutation?

A. Well, Mr. Finley had a big smile on his face, I recall, when I walked into his office, and at that particular time I am safe and sure in saying this, that the first discussion was one pertaining to the possibility of M. C. A. serving the Mission Beach Ballroom with orchestras. That was the first element of discussion.

Q. Did he at that time, when you walked in, say he was angry with you and told you, or, he said that he thought that you had hit a new low in lowness by coming

(Testimony of Harold Eames Bishop)

down to appear before the City Council in San Diego in Dailard's behalf?

A. There was no discussion along that line whatsoever.

Q. Did he also say to you, he says angrily, that it was a rotten thing for you to call Ralph Wonders of General Amusement and ask Ralph Wonders to come down and appear with you?

A. He said nothing in that regard.

Q. Did you talk about Ralph Wonders appearing there with you? [1031]

A. There was no conversation at that time relative to Ralph Wonders coming down with me.

Q. Did he say anything at that time, in substance or effect, that the lowest thing of all was calling Jack Flynn on the telephone about a week previous to that time, that is, the time of the conversation, and telling Jack Flynn that Dailard had been awarded the lease at Mission Beach, and that Flynn should write a letter to Dailard refuting his list of the bands? Was there anything like that?

A. There was no such conversation.

Q. Did you talk about Flynn down there at all?

A. No, there was no discussion about Flynn.

Q. Did Mr. Finley on that occasion say to you that he wanted nothing to do with you, and he would rather run recorded music in the ballroom than to buy bands from you, or from M. C. A.?

A. There was no such statement made.

Q. And that he would not deal with you personally at all?

A. There was no such statement made.

(Testimony of Harold Eames Bishop)

Q. Was there a discussion on that occasion of any opening date or playing dates that Mr. Finley had or suggested?

A. To my definite knowledge, there was no discussion in that regard. That is, I do not recall at this time that Mr. Finley made the statement that he had received the contract [1032] or not, but I know there was no discussion as to a policy or an opening date.

Q. Did you talk about the Trianon operation at all?

A. Mr. Howard—well, I don't know. There was no conversation when I came in relative to the Trianon.

Q. That is, relative—

A. To the booking in the Trianon.

Q. Did you talk about the place at all, or anything like that?

A. I might have passed some comment about the Trianon Ballroom. I don't recall. It was a side conversation.

Q. Well, was the attitude there of Mr. Finley toward you, let me put it, and you toward Mr. Finley one of anger?

A. There didn't appear to be any anger on Mr. Finley's part.

Q. And on your part?

A. And there was no animosity on my part toward Mr. Finley at that time.

Q. Nor now? A. Nor now.

Q. Mr. Bishop, when did you next see Mr. Finley, that is, to talk to him?

A. The next time that I saw Mr. Finley was in mid-May, and had to do with the actual signing of the Tommy Dorsey contract for appearance at the Mission Beach Ballroom in [1033] San Diego.

(Testimony of Harold Eames Bishop)

Q. Did you have any conversation with him over the telephone prior to that time?

A. One conversation, at which I called him at the Beverly Wilshire Hotel, I believe he was staying there at that time, and he asked that I bring the contract to his suite at the hotel, which I did.

Q. Was that the time it was signed?

A. No. Mr. Finley, even though I brought the contract over within fifteen to twenty minutes from the time of our conversation, was not in his suite, and I left a message at that time that I would be at my office and he could come by to sign the contract when it was convenient.

Q. And he did come to your office?

A. He came to my office.

Q. And you talked to him?

A. I talked with him, yes.

Q. And he talked with you? A. Yes.

Q. Did he raise any question there of animosity or not dealing with you, or anything of that kind?

A. There appeared to be no question of any animosity at all.

Q. By the way, I don't believe I have asked you this. I don't believe that I did. Did you talk to Mr. Barnet about [1034] calling up Ralph Wonders, I believe it was, and Mr. Flynn, or whoever it was you talked with in these two conversations?

A. I had no conversation with Barnet relative to that, no.

Q. Either before you called or after?

A. Either before or after the time I called, relative to the calls to Wonders and General Amusement.

(Testimony of Harold Eames Bishop)

Q. The calls you made there were independently, on your own part; is that right? A. That is correct.

Q. Did you have any conversation—I don't know whether I asked you this: Did you have any conversation with Mr. Barnet about going down at the time that the council meeting was to be held to consider the bids?

A. I don't recall any conversation relative to going down, with Barnet.

Q. That is, you don't recall talking to him about going down? A. That is correct.

Q. Hal Howard, I believe, went down with you?

A. Mr. Howard flew down, yes. He is a pilot.

Q. Was there any joint discussion with Mr. Howard and Mr. Barnet, in which you took part, about your going down to San Diego on that particular occasion?

A. There was no joint discussion. The decision to go [1035] to San Diego was strictly my own decision.

Q. Now, have you ever seen or talked to Mr. Finley since the occasion in May when the Tommy Dorsey contract was signed?

A. I saw Mr. Finley two times since that time, that I can recall, and I have possibly seen him more. I believe the first time was some time in July, at the time of a call I made down at the Casino Gardens, and he was at the Casino Gardens.

Q. Will you relate what occurred on that occasion?

A. Well, I bumped into Mr. Finley immediately after I got in the entrance, and he came up with a big smile, and we shook hands, and we talked for a few minutes about minor matters of which I have no recollection, and I told him following that that I was going down to Foreman Phillips Country Barn Dance, to see just what the

(Testimony of Harold Eames Bishop)

conditions were over there, and how well the Barn Dance was doing. He said, "I am very much interested. I would like to go down there with you." So Mr. Finley and I walked outside and got on one of the little cars to the beach and went to the Foreman Phillips Barn Dance and took a look at it.

Q. And what is Foreman Phillips—

A. That is a barn dance on the Venice Pier which caters to western bands, western dance fans. Foreman Phillips is the promoter, and the dance has assumed the name Foreman Phillips Country Barn Dance. They cater to fans that like [1036] that type of dance music, and it runs every Friday, Saturday and Sunday.

Q. Is that like the Bob Wills type?

A. It is a similar presentation to Bob Wills, that is correct.

Q. The people that play at those barn dances, are they name bands?

A. Yes, definitely, Bob Wills is a name band, and many of the bands Foreman Phillips has presented are name bands.

Q. Are there any other name bands of that type?

A. Yes, you have Roy Akoff. That is a name band that has a considerable reputation and recognition. Then there is the Ted Daffin and Happy Perryman. There are many others. Texas Jim Lewis. Oh, I could probably name ten to fifteen of them that appear in this area.

Q. Now, on the occasion of your riding down to the Foreman Phillips place on this tram car, when you were together with Mr. Finley, did he talk to you again about this low, rotten trick that you had done in talking to

(Testimony of Harold Eames Bishop)

Flynn or attempting to work in Dailard's behalf, as he said?

A. Well, actually, as a matter of fact, in our conversation there Mr. Finley, as he has been in every meeting I have had with him, was very, very friendly. He said he would like to do business with me and that he wished I was handling his account at the Casino Gardens, and that he liked the way [1037] in which I did business. And he at that time advised me that things were going along quite well at the Mission Beach operation. He discussed with me the Casino Gardens operation, and how things were going along well there. He made no special demand on me for orchestras at Misison Beach, nor were any names suggested for Mission Beach at that time in that conversation.

Q. Did he ask you if you had any bands for Mission Beach? A. He made no such statement or request.

Q. Did he tell you that he wanted to get some bands from M. C. A. for Mission Beach?

A. There was no statement along that line, no.

Q. At the time you saw him in May, when you signed this contract for Tommy Dorsey, that was to play at Mission Beach? A. That is correct.

Q. Did he say anything at that time about wanting any other bands for Mission Beach?

A. He made no requests for music at Mission Beach at that time.

Q. Has he at any time ever requested of you submission to him of any bands for playing at Mission Beach?

A. Only that contained in the original conversation that I had with him at the time of the meeting at the

(Testimony of Harold Eames Bishop)

Trianon [1038] Ballroom or Radcliffe at San Diego, following the City Council meeting.

Q. The one you have related here just a few minutes ago?
A. That is correct.

The Court: I believe we will just suspend now for a few minutes. Ladies and gentlemen, we will take our recess. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Warne: Mr. Bishop, you are familiar with the contract in evidence here, Defendants' Exhibit F, being the Wayne Dailard-Music Corporation of America contract entered into in May of 1944?

A. Yes, I am familiar with it.

Q. That contract was entered into about the date it bears?

A. Approximately the date it bears. The original contract was received from Mr. Dailard I think several days before this contract was arrived at.

Q. Did you have any conversation with Mr. Barnet, or with any other person of M. C. A., about this form of contract, when it came in from Mr. Dailard?

A. When this contract came in from Mr. Dailard, I turned it over to Mr. Barnet, and I believe that in the original form in which it was presented to us by Mr. Dailard there was some [1039] change. I am not acquainted with that. I believe there was, and subsequently this form was arrived at, and was negotiated.

Q. And was executed?

A. And was executed by the parties to the agreement.

(Testimony of Harold Eames Bishop)

Q. Was there any conversation had at that time by you with Mr. Stein about the terms of this contract?

A. Not prior to the time that this contract was originally brought in from Dailard.

Q. Was there any discussion at any time about any contract with Mr. Stein or Mr. Barnet, or with any one else of M. C. A., about having a contract which would give the exclusive booking at Pacific Square and Mission Beach to Dailard from Music Corporation of America?

A. There was never any discussion relative to an exclusive booking. The discussion was pertaining to this contract of first refusal.

Q. Was there any discussion at that time about the fact that this contract of May, 1944, Defendants' Exhibit F, superseded the letter form of agreement of November 4, 1941?

A. To my knowledge, it was mentioned that this contract was, in sum and substance, practically the same contract that was in existence as of the date in November of 1941. It was just worded differently, but the information and clauses meant the same thing.

Q. Of course, you are familiar with the November 4, 1941, [1040] contract? A. I am, yes, sir.

Q. Do you call that your signature that is below Carl Kramer on there?

A. That purports to be my signature, yes.

Q. As I understood your testimony this morning, these two contracts are the only contracts of which you have any knowledge, existing between M. C. A. and Mr. Dailard? A. That is correct.

Q. Do you know of any other agreement that has existed at any time from 1941 to 1944, and down to this

(Testimony of Harold Eames Bishop)

day, or at least down to January 1st or February 3rd, let's put it, 1945, between Music Corporation of America and Mr. Dailard, other than these two written agreements?

A. There is no other agreement, to my knowledge.

Q. What do you mean, to your knowledge?

A. I know of no other agreement.

Q. Did you ever have any other agreement with Mr. Dailard?

A. I had no other agreement, other than those two which are in evidence.

Q. Did you ever have any other understanding of any kind, other than these formal agreements, with Mr. Dailard of any kind?

A. There was never any understanding other than those contained in those agreements. [1041]

Q. Now, you know that Mr. Stutz, in the new management, took over July 1, 1945? A. Yes.

Q. You have had contacts with Mr. Stutz with reference to booking orchestras? A. That is correct.

Q. Has there been any contract or agreement of any kind executed between Mr. Stutz and Music Corporation of America, to your knowledge?

A. There is no agreement between Music Corporation of America and Mr. Stutz.

Q. Is there any understanding of any kind, let us say, that you have entered into with Mr. Stutz?

A. There is no other understanding other than of business relationship on each individual attraction, as they are submitted.

(Testimony of Harold Eames Bishop)

Q. That is, on each proposal to book a band into Pacific Square; is that correct?

A. That is correct.

Q. Was there ever any discussion about assigning this Dailard-M. C. A. contract?

A. Yes, there was discussion.

Q. And Mr. Stutz was a party to that?

A. Mr. Stutz, at the time the sale was discussed,—

Q. I am just asking you if he was a party to that. [1042] A. Yes.

Q. And was Mr. Dailard a party?

A. Mr. Dailard was a party.

Q. Did Mr. Dailard ask you to assign it?

A. Mr. Dailard asked if we would assign the contract that he had for Music Corporation of America bands.

Q. To the new owner? A. To the new owner.

Q. And did you reply to him?

A. I replied that there would be no assignment of the contract.

Q. And there was no assignment of the contract?

A. There was no assignment of the contract.

Q. You have continued to book bands for Mr. Stutz on request? A. That is correct.

Q. You have booked the whole of the bands in there?

A. I booked practically all of the bands into Pacific Square.

Q. Are they all M. C. A. bands?

A. All of the bands since Mr. Stutz took over, I think with one exception, are M. C. A. bands, that have played there so far.

(Testimony of Harold Eames Bishop)

Q. Have you had any telephone conversation with Mr. Dailard—I will put it this way: I believe Mr. Dailard [1043] referred to a telephone conversation he had with you with reference to some girl band. Do you remember about that? A. Mr. Dailard?

Q. No, Mr. Finley.

A. Yes. I think I recall from his testimony something about a Joy Caylor orchestra.

Q. Joy Caylor. Do you know that orchestra?

A. I know that orchestra.

Q. What conversation, or, what occurred between you and Mr. Finley with reference to that?

A. I put in a call to Mr. Finley. I don't know where our switchboard operator reached him. I think it was some time in September or October of 1945. He came on the other end of the telephone, and I discussed the availability of Joy Caylor's orchestra, all-girl orchestra, of considerable ability and reputation for the Trianon Ballroom in San Diego. He at that time advised me that there was no opening at the Trianon and consequently turned down the submission of the Joy Caylor orchestra.

Q. Was there anything said in that discussion about booking any bands into Mission Beach?

A. There was nothing in that discussion relative to Mission Beach booking.

Q. Did he ask you anything about Mission Beach at that time? [1044]

A. To my knowledge there was no discussion relative to Mission Beach.

(Testimony of Harold Eames Bishop)

Q. Did he say to you, "When are you going to give me some of your top name bands, like Harry James and Krupa?"

A. There was no discussion in that regard.

Q. And did you reply, "You are not going to get these kinds of bands"?

A. There was no discussion in that regard.

Q. Have you ever had any discussion regarding booking bands at Mission Beach with Mr. Finley since that time in the Trianon Ballroom?

A. No, there have been no discussions relative to that, that I can recall.

Q. There has been some mention here of the King Sisters. Do you know who the King Sisters are?

A. Yes.

Q. That is a singing aggregation, three girls?

A. That is a singing aggregation.

Q. Do you recall whether that aggregation ever played Pacific Square prior to 1945? [1045]

A. Yes; the King Sisters originally were a part of the Alvino Rey orchestra, and Alvino Rey orchestra had been previously booked into Pacific Square, I think either one or two times. The King Sisters appeared at Pacific Square as a member of that organization or as a part of that organization of Alvino Rey orchestra.

Q. Do you know that the King Sisters played Pacific Square or showed at Pacific Square a date in February, 1945?

A. Yes; I know that they did in February.

Q. And who arranged that booking?

A. I arranged the booking.

(Testimony of Harold Eames Bishop)

Q. I show you a document called an "inter-office communication" dated January 11, 1945, which I have shown to counsel. Did you ever see that before?

A. Yes; I saw this communication before.

Q. Do you recognize the writing in pen at the bottom of the document?

A. Yes, I do.

Q. What are those letters?

A. That is the initials of Mr. Ken—Kenneth Later who was an employee of our office.

Q. Just what are they?

A. It is K-e-n, Ken.

Q. When did you first see this document?

A. Shortly after January the 11th. I would say possibly [1046] the 12th or 13th I did see that document.

Q. From whom did you get it?

A. Mr. Barnet.

Q. Did you have any conversation with Mr. Barnet at that time?

A. Mr. Barnet put the document on my desk and he said that the King Sisters were available for a booking at Pacific Square. I told him that I would submit the King Sisters and advise back as to the booking of the group.

Q. And did you do that?

A. I submitted the King Sisters to Mr. Wayne Dailard. He confirmed the King Sisters, and the booking was a confirmed booking, I advised, through the usual office channels.

Mr. Warne: I will offer, if the court please, the document identified by the witness, as the defendants' next in order.

The Court: So ordered.

The Clerk: Defendants' Exhibit M.

(Testimony of Harold Eames Bishop)

(The document referred to was marked as Defendants' Exhibit M, and was received in evidence.)

Mr. Warne: I would like to read the subject matter of this at this time, if the court please.

The Court: Very well.

Mr. Warne: This is on the letterhead or form of the Music Corporation of America, labeled "Inter-Office Communica- [1047] tion." That is printed.

"Date: January 11, 1945. From Kenneth Later at B. H."

Q. What does "B. H." stand for, if I may interpolate? A. Where is it? If I could see it?

Q. "B. H."? A. The initials "B. H."?

Q. Yes. A. Beverly Hills Office.

Mr. Warne: Thank you. Reading again:

"To Larry Barnet at B. H.

"Subject: King Sisters

"I have the King Sisters available for the Pacific Square in San Diego, salary \$1500. Please advise what date I can confirm this booking.

"(Signed) Ken"

Signed "Ken" at the bottom in ink, K-e-n.

Q. Had you had any conversation with Mr. Wayne Dailard about the King Sisters prior to this January 11th date?

A. There was conversation with Mr. Dailard relative to the King Sisters. They had achieved considerable notoriety through records and were quite desirable as an act, and he advised me—I don't know the exact time, but it was in 1944—that if and when they were available for

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booking at Pacific Square, he would entertain the submission. [1048]

Q. Did you discuss that with Mr. Barnet prior to January 11th? A. About the King Sisters?

Q. Yes.

A. I do not recall whether I had discussed it with Mr. Barnet or not.

Mr. Warne: You may cross-examine.

Cross Examination

By Mr. Christensen :

Q. You know a man by the name of Morry Landau, don't you? A. Yes, I do.

Q. You know about that matter up in Ventura, don't you? A. What matter are you referring to?

Q. You know that he was engaged in a ballroom operation up there, don't you?

A. Mr. Landau? I know that Mr. Landau presented one-night attractions in Ventura.

Q. Oh, while I think about it: How did you happen to submit this Exhibit M to Mr. Barnet?

A. Did I present that to Mr. Barnet? I did not present that to Mr. Barnet. He presented it to me.

Q. Was that after Mr. Later and Mr. Barnet had talked with Mr. Finley about the King Sisters?

A. I do not recall their conversation. [1049]

Q. But, in any event, Mr. Barnet told you to call Dailard and confirm this booking?

A. Mr. Barnet presented this availability on my desk and I consummated the booking.

Q. He did not tell you that he had already agreed, both he and Mr. Later had agreed, that Mr. Finley could

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have the King Sisters for booking at Mission Beach, did he?

A. There was no statement in that regard, no.

Q. He made no such statement to you?

A. He made no such statement.

Q. He just said, "Here, book this into Pacific Square?"

A. He said, "Here is an availability for Pacific Square."

Q. And you got on the telephone right away and called Dailard?

A. That is correct.

Q. You know that Mr. Dailard is still advising and participating in the booking of M. C. A. bands for Stutz at Pacific Square, don't you?

A. I have no such knowledge.

Q. Have you submitted to Mr. Dailard any orchestras for his employment since the sale of Pacific Square to Mr. Stutz?

A. I submitted no orchestras direct to Mr. Dailard. Shortly after—I can explain, I think, the point that you—

Q. No. You can just answer my question. [1050]

Mr. Warne: Just a minute, I submit that is a fair answer to the question.

The Court: He was answering the question and then he diverted to explain. He did not finish the answer to the question he was asked.

The Witness: Would you repeat the question, please?
(Question read by the reporter.)

A. No.

(Testimony of Harold Eames Bishop)

Q. By Mr. Christensen: I want to show you your deposition, at page 106, lines 22 to 26, inclusive. Will you look at it, sir? Have you read it now?

A. I have read it.

Q. I ask you if upon the occasion of the taking of your deposition, Mr. Bishop, if you were not asked this question?

“Have you submitted to Mr. Dailard any orchestras for his employment since the sale of Pacific Square by him to Mr. Stutz?”

And if you did not give this answer:

“Bands have been discussed with Mr. Dailard. He is advising Mr. Stutz on his band problems.”

Did you give such an answer?

A. Such an answer was given.

Q. That is your answer?

A. That is the answer, but could I qualify?

The Court: You can qualify the answer, yes. [1051]

A. The question which he asked me meant was Mr. Dailard the employer, if the court reporter would read that. Did I submit them to Mr. Dailard for his employment? That is not so. I did not submit any bands for Mr. Dailard's employment. I submitted bands to Mr. Dailard. Mr. Stutz advised me that for a month or two Mr. Dailard would help him in the submission of the bands, and for possibly two or three weeks thereafter I submitted bands to Mr. Dailard.

Mr. Warne: If the court please, I do not believe it was established in the question that was asked that this deposition was taken on August 6th, 1945. I think that is a fact.

Mr. Christensen: August the 9th.

(Testimony of Harold Eames Bishop)

Mr. Warne: August the 9th. I stand corrected.

Q. By Mr. Christensen: Before going to San Diego to appear there before the council did you discuss this matter at all with Mr. Barnet, the fact of your trip?

A. No.

Q. It is your custom and practice, is it not, to discuss with Mr. Barnet any field trips you are making?

A. Not necessarily.

Q. However, you generally do, do you not?

A. There is no rule as to that regard. I might discuss it or I might not discuss it with him.

Q. Well, don't you generally do it? [1052]

A. I would not say generally.

Q. I will ask you if on the occasion of your deposition you were not asked that same question. First of all, will you look at page 45? Have you read it now?

A. Yes.

Q. On that occasion were you not asked this question: "But you generally do?" A. Yes.

Q. You answered: "Generally do." That is correct, is it not? A. That is correct.

Q. Now, do you want to explain the difference in your answers?

A. Well, I mean by my answer, and the facts of the case are, that there is no rule, generally speaking, to consult with Mr. Barnet, who is my superior, as to any field trips that I may deem necessary in the execution of my responsibilities. There is no general or standard practice in that regard. If, in my opinion, I decide a case that my presence is needed, I can go without discussing that with him. If I feel I need the benefit of his advice as to the matters which I may present or as to discussions

(Testimony of Harold Eames Bishop)

there, I may discuss it with him. But generally, there is no general rule. I may or I may not. But, as a general practice, you [1053] can't say—it is not right that I do discuss it with him.

Q. Then, this answer is not true?

A. It is not strictly true.

Q. Now, you say that while you were at the Council, someone stood up and said that the representative from Music Corporation of America was there. That person could not happen to be Ed Wakelin, could it?

A. It may have been Mr. Wakelin. If my memory serves me correct, he was sitting with another gentleman who I hadn't seen before. I don't know who made that remark. I don't recall.

Q. You think it was Mr. Wakelin, though, don't you?

A. I do not recall.

Q. I ask you upon the occasion of the taking of your deposition if you were not asked that question and gave the answer: "I think Mr. Wakelin said that."?

A. It might have been Mr. Wakelin; I do not recall.

Q. Tell me whether you said that in your deposition? Mr. Warne: Please let him see it, if the court please.

Q. By Mr. Christensen: Then, your answer there was not true?

A. I think so. It may not be complete. It was one or the other of the two gentlemen.

Q. Your answer here, then, was not true?

A. I could not say that it was or that it was not. I [1054] don't know what it was. It was one of the two gentlemen.

(Testimony of Harold Eames Bishop)

Q. You recall talking to Mr. Ralph Wonders at or about that time, don't you, sir?

A. At or about the time of the meeting in San Diego?

Q. Yes; either, I think, it was the week prior to that time. Don't you?

A. I recall the conversation with Mr. Wonders approximately at that time.

Q. And at that time did you tell Mr. Wonders that Mr. Dailard had obtained a renewal of his contract at Mission Beach?

A. I made no such statement.

Q. Did you say to him, did you at that time tell him that Mr. Dailard had assured you that he was going to secure the contract?

A. I believe I might have made remarks in that regard. I did state that.

Q. As a matter of fact, that conversation with Mr. Wonders took place about a week before the bids were opened; that is true, isn't it?

A. I do not recall exactly when. It was prior to my trip to San Diego.

Q. And you made your trip to San Diego the date that bids were to be opened?

A. That is correct. I made my trip to San Diego on [1055] November the 8th, the date the City Council meeting was. I don't know when the bids were opened, whether they were opened then or opened earlier and they were to be considered on November 8th. But the date the City Council met, as it has been discussed here, was the date that I went to San Diego.

Q. Did you discuss your telephone call to Ralph Wonders with Mr. Barnet?

A. I did not discuss it with Mr. Barnet?

(Testimony of Harold Eames Bishop)

Q. Didn't tell him a thing about it?

A. Told him nothing about it.

Q. Did you discuss your telephone call to Mr. Flynn with Mr. Barnet?

A. I did not discuss it with Mr. Barnet.

Q. You kept still about that?

A. That is correct.

Q. What is the name of the other man you telephoned to, one of the booking agents?

A. I don't recall telephoning any of the other booking agencies. I talked with other agents, the Frederick Bros.

Q. Who did you talk with there?

A. Well, I don't believe I talked with them prior to this other than on actual bookings. I don't believe I talked with them relative to the situation between Pacific Square and Mission Beach. [1056]

Q. At any event, you called both Mr. Flynn and Mr. Wonders and told them that Dailard was going to get the bid?

A. I told them that I was advised by Mr. Dailard that he was going to be successful in securing the bid; yes.

Q. And that they should withdraw their letters that they had given—

A. I made no such statement.

Q. —and later told them they had better write letters to Mr. Dailard?

A. I made no such statement so far as writing letters to Mr. Dailard. I learned that the possibility was that they had written letters. The nature of my call to them was to ascertain if they had written those letters and the contents of those letters, and to advise them that I understood that Mr. Dailard was going to be able to continue his operation of Mission Beach.

(Testimony of Harold Eames Bishop)

Q. Now, what was your purpose in making those calls, Mr. Bishop.

A. In servicing Mission Beach with orchestras, we needed the attractions of Pacific Square—rather, needed the attractions that the other agencies had, in order to operate. We had a vast amount of customers that were asking for orchestras. If one of the competitive agencies had an orchestra which could play at Pacific Square, then the orchestra, if we did have an orchestra that would be [1057] scheduled for there, we could arrange for other customers and have other demands elsewhere.

Q. It was not to help Mr. Dailard, then?

A. It was to help Mr. Dailard; yes.

Q. And to see to it, if possible, that he got the bid on Mission Beach—he got the lease on Mission Beach?

A. So far as to see that he got the bid on Mission Beach, it was to understand what their position was going to be relative to whether or not Mr. Dailard would be able to operate Mission Beach or not, or whether or not Mr. Finley would be able to operate Mission Beach; just what their intentions were.

Q. You knew what their intentions were, didn't you?

A. I was advised that they would do business with both parties, whichever one bid the highest price for the bands.

Q. You knew that before you telephoned, didn't you?

A. I wasn't sure of that. To my knowledge, I felt that they were satisfied with the presentation of their attractions in San Diego. I know that the majority of the attractions which they had submitted were played at Pacific Square in San Diego, and I thought that they

(Testimony of Harold Eames Bishop)

were pleased with it, other than the fact that they split commissions with me for their bands which we arranged.

Q. They always had to split commissions with M. C. A. in order to play in Pacific Square, didn't they? [1058]

A. That is wrong. In some instances they split commissions; in some instances they did not split commissions.

Q. Tell me when they did not split commissions?

A. They did not split commissions when Pacific Square needed that orchestra and we had no other orchestra to put in of equal caliber.

Q. In other words, if you were right up against it, then you would not require them to split their commission with you; is that the statement?

A. One qualification I would put on it. In the instance of such a band as Tommy Dorsey, which is a band of great credit to wherever he may play. In the conversation with Mr. Wonders relative to the booking of Tommy Dorsey I asked for a commission. He said, "Ames, on a band like this we are not going to give you any commission." I said, "O.K."

Q. You did your best to get it, though, didn't you?

A. I always did my best to get a commission from him, yes.

Q. In other words, if there was going to be any booking in Pacific Square, you wanted to get for M. C. A. a commission on that, didn't you?

A. For every booking in Pacific Square I wanted to get a commission if possible.

Q. Or else they don't play in Pacific Square?

A. That is not so. The record speaks for itself. The [1059] bands played in Pacific Square without paying M. C. A. a commission.

(Testimony of Harold Eames Bishop)

Q. That is when you couldn't help yourself, isn't it?

A. When they refused to pay me the commisison; that is right.

Q. Let us go back to these letters. You knew the contents of those letters before you telephoned both Flynn and Wonders, didn't you?

A. I did not know the contents of the letters.

Q. You had been advised of their contents, hadn't you?

A. I had not been advised. I had been only generally advised of the fact that there was a possibility that they had sent letters. At the time of the conversation, I even had no distinct assurance that the letters had been sent.

Q. Who told you the letters had been sent?

A. I think it was just a conversation I heard. Whether or not it was Mr. Thayer that told me that—

Q. When did you hear it?

A. When did I hear it?

Q. Yes.

A. Prior to the time that I went to San Diego.

Q. Did you say Thayer was talking about it?

A. No; I didn't make any such statement that Mr. Thayer was talking about it.

Q. Well, I misunderstood you, then. I understood you [1060] to say that you overheard a conversation that Mr. Thayer had concerning it. Is that true or not true?

A. I don't recall any conversation in that regard.

Q. Well, did you hear Mr. Thayer speak of the fact?

A. No. I don't recall ever hearing Mr. Thayer speak of it.

Mr. Christensen: Mr. Reporter, would you go back there to the answer concerning Thayer and read it to me?

(Testimony of Harold Eames Bishop)

Mr. Warne: That assumes that there was an answer concerning Thayer. I did not so hear it.

The Court: Yes; let the reporter read the record.

Mr. Christensen: I may be entirely in error, Mr. Warne, I don't know, but I would like to have it read.

(Record read by the reporter.)

Q. You don't know, then, whether it was Mr. Thayer or not?

A. In speaking of the name Thayer, it should be "Dailard". I don't know how Thayer came in the conversation there.

Q. Mr. Thayer is the vice president of the Music Corporation?

A. Mr. Thayer is not the vice president of the Music Corporation.

Q. What is his position there?

A. Mr. Thayer is a salesman with Music Corporation of [1061] America.

Q. Did you tell Mr. Wonders when you talked to him on the phone that you wanted him to bring a list of your bands, meaning M. C. A. bands, down and present the list to the City Council?

The Witness: Will you repeat the question, please?

Mr. Christensen: Will you read it, Mr. Reporter?

(Question partially read by the reporter.)

Mr. Christensen: I want to correct that; I want to correct that.

Q. Meaning G. A. C. bands?

The Court: Now, re-frame your question.

Mr. Christensen: Yes. I withdraw the question that is pending.

(Testimony of Harold Eames Bishop)

Q. Did you tell Mr. Wonders that you wanted him to bring a list of G. A. C. bands down and present that list to the Council? A. No.

Q. The City Council? Pardon? A. No.

Q. Do you recall having a luncheon at which Mr. Dailard and Mr. Wonders were present?

A. No; I do not recall a luncheon.

Q. I believe it was at the Players' place?

A. No. [1062]

Q. You do not recall that at all?

A. I would say that there was no luncheon at which I was present.

Q. Let us go back. You have handled exclusively the bookings had at Pacific Square during the year 1945, haven't you?

A. On a first refusal basis for Music Corporation of America attractions, I have handled Pacific Square.

Q. Has there been any band which you submitted to either Mr. Dailard or Mr. Stutz that has been turned down by either of them?

A. To my knowledge they have turned down no submissions that have been made to them.

Q. And you have furnished all the bands that were played there in the year 1945, with five exceptions, is that true?

A. My memory would not allow me to say that correctly. I have records in that regard.

Q. Well, let me refresh your memory. With the exception of Artie Shaw, George Ault, Stan Kenton, and

(Testimony of Harold Eames Bishop)

Vaughn Monroe, you have booked every band that played in Pacific Square during the year 1945, haven't you?

A. On the weekends. There was other times that orchestras were used at Pacific Square during week-days which I have no knowledge of. During the weekends, I believe that is [1063] correct. To make an exact statement that is correct I would have to look over my records.

Q. Let us get away from the weekends. Tuesday is not a weekend, is it?

A. Tuesday is not a weekend; no.

Q. Tell me, you put bands into Pacific Square every Tuesday, didn't you?

A. Not every Tuesday. I booked occasional Tuesdays. Texas, Western bands in the Pacific Square.

Q. As a matter of fact, you booked Bob Wills, one of your bands, in there for every Tuesday, didn't you?

A. That is not correct.

Q. Tell me what Tuesday during the first part, let us say, January 1st to July 1st of 1945, that Bob Wills did not play there?

A. I can consult my records and give you that information. During the first part of January there was no Tuesdays that Mr. Bob Wills played at Pacific Square.

Q. What day of the week was it?

A. I don't believe that he played any other day. He started the latter part of January at Pacific Square, and I think he played fairly consistently during the early part of the year, and, if my memory serves me correctly, during the latter part of the year of 1945 Mr. Wills only appeared intermittently, possibly once every four weeks. But there was [1064] no definite schedule of every Tuesday re-occurrence of Bob Wills orchestra.

(Testimony of Harold Eames Bishop)

Q. Well, let us put it in another way. Bob Wills had been playing at the Mission Beach during the year 1944, hadn't he? A. Yes.

Q. And you felt him to be quite an attraction in the San Diego area, didn't you?

A. He was quite an attraction; yes.

Q. So I think you are perfectly right that he did not play in the month of January. But beginning February, you did book him into the Pacific Square for a period of a number of months, didn't you?

A. I think the records can verify that. I know that he played fairly consistently from the last Tuesday in January, which, if my memory serves me correctly, was January the 30th.

Q. Just a couple of days before Finley opened up?

A. Actually, that is the way I imagine it worked out. He opened in February.

Q. Did you book any local band into Pacific Square during the year 1945, sir?

A. Local San Diego band?

Q. Yes, or local Los Angeles, San Diego or Los Angeles County band, either one?

A. When Bob Wills was not available during the time [1945] that they had Western dances on Tuesday nights, I secured a couple of other Western bands. I believe Happy Perryman was one orchestra; I believe Hank Perry was another orchestra. I don't recall whether Texas Jim Lewis was another orchestra that played during January there on a Tuesday night, but I believe that he was. Our records can verify that.

(Testimony of Harold Eames Bishop)

Q. Well, did you get any other bands that you can now recall for Pacific Square for the year 1945?

A. Other than those that we have discussed?

Q. That is right. A. On other nights?

Q. I am talking about your local bands, not your name bands, sir.

A. I would have to consult my records to be sure about local name bands having played there.

Q. Now, what compensation did you receive from Dailard for performing these services for him?

A. For booking the Pacific Square account during my relation with Mr. Dailard?

Q. Yes.

A. I received no compensation whatsoever.

Q. What did you receive for booking these local bands in there?

A. I received no compensation from Mr. Dailard other than the commission which is prescribed by the Musicians'[1066] Union as a commission suitable to be taken by an agency.

Q. But he gave you gifts from time to time, didn't he?

A. Mr. Dailard gave me one Christmas present during the four years of my handling his account, a package of fruit which arrived once each month, a Fruit of the Month present.

Q. Did he give you some money at the time you were building your house?

A. Mr. Dailard has never given me any money. He has not given me any present of any sort, of any value whatsoever, other than the Fruit of the Month.

(Testimony of Harold Eames Bishop)

Q. Directly or indirectly?

A. Directly or indirectly or any other way.

Q. Now, you had available there for every weekend at the Pacific Square during the year 1945, with the five exceptions, your name bands, didn't you?

A. Yes; I would say that.

Q. Let me ask you, is it not true that a name band is a band that is recognized by the general public as a band set up in the business of music-making?

A. I would say that that is a fair statement, yes.

Q. In other words, to state it in a couple of words, a name band is a band that has made a name for itself throughout this country?

A. I wouldn't say that. A name band is a band that has [1067] made a name for itself in a community or in an area, either county-wide, city-wide, state-wide, or international.

Q. Then it would not be the general public, would it?

A. Well, general public are here in Los Angeles. They are general public.

Q. Oh, I see.

The Court: Nothing further, gentlemen?

Mr. Christensen: Yes, I have. Yes, sir; I have a lot of questions, your Honor.

Q. You recall the booking there of Tommy Dorsey into the Mission Beach ballroom, don't you?

A. Yes.

Q. You know about that, don't you?

A. Yes.

(Testimony of Harold Eames Bishop)

Q. You first learned about it when Tommy Dorsey's manager, Mr. Michaud, called and told you to issue the contracts?

A. I don't recall whether that is the first knowledge that I had that the booking was being contemplated, no.

Q. What is your best memory as to your first knowledge of that matter, Mr. Bishop?

A. Well, I had heard discussions prior to the time that I was advised to issue the contracts that Tommy Dorsey was considering going to Mission Beach?

Q. And you talked to Mr. Michaud? [1068]

A. That is right.

Q. He at that time was in New York?

A. That is correct.

Q. And you requested him to not book the date at Mission Beach, didn't you? A. I did not.

Q. Did you tell him that he should not play down there?

A. I told Mr. Michaud that Pacific Square had presented Tommy Dorsey's orchestra many times in the past; that his orchestra had always enjoyed a very exceptionally fine business at Pacific Square. I told him that, in my opinion, my advice would be for him to continue appearing at Pacific Square for reasons: One, I thought his gross would be bigger; two, the Pacific Square was not a seasonal operation, and that there might be occasion when Mr. Dorsey would be available for booking in San Diego possibly in the wintertime when it was not advantageous and sound business to play at a beach resort; and I did not feel that he should incur the displeasure of Mr. Dailard by playing competition to him.

(Testimony of Harold Eames Bishop)

Q. And Mr. Michaud told you that Mr. Tommy Dorsey wanted to play there, though, at the Mission Beach ballroom?

A. Mr. Michaud at that conversation told me that he would discuss the matter with Tommy Dorsey and that he would advise me back.

Q. You asked Mr. Michaud if it would be all right with [1069] him, Mr. Michaud, for you to call Tommy Dorsey directly at the place he was playing then, which I believe was Boston; that is correct, isn't it?

A. I may or may not have made that statement. I don't know.

Q. And you did telephone to Tommy Dorsey in Boston, didn't you?

A. I did not telephone Tommy Dorsey.

Q. Well, you talked to him there?

A. I did not talk to Mr. Dorsey.

Q. Did you talk to Mr. Dorsey at all?

A. I did not talk to Mr. Dorsey personally relative to the appearance in San Diego.

Q. How many times did you talk to Mr. Michaud about it?

A. To my knowledge, I talked to Mr. Michaud only on this one conversation, and I don't recall exactly whether I was advised by wire or by telephone call or through another member of our organization to issue the contracts. That may possibly be another time that I talked to Mr. Michaud.

Q. Even though you had tried to discourage Mr. Michaud—Mr. Dorsey, through Mr. Michaud, from playing

(Testimony of Harold Eames Bishop)

Mission Beach ballroom, he said he wanted to play Mission Beach ballroom, didn't he?

A. The only information following the discussion which [1070] I have herewith stated to you was the information that the contract should be issued, and a statement of terms under which those contracts should be issued.

Q. In other words, you were advised by Tommy Dorsey of that fact? A. By Arthur Michaud. [1071]

Q. Now, that was a direct booking by Mr. Finley with Mr. Tommy Dorsey?

A. The booking—the mention of the price was direct. The booking was executed by Music Corporation of America, in fact we secured the signatures of the principal parties.

Q. You insisted on that, didn't you?

A. We insisted that the contract be on Music Corporation of America forms.

Q. At that time you wanted it on M. C. A. forms; is that right?

A. I don't—your implication there—we always insist on our bands that they be on M. C. A. forms.

Q. Did you ever hear of Paul Martin?

A. Yes, I have heard of that.

Q. You got your commission on the Dorsey booking?

A. Is that a question?

Q. Yes, sir. A. Yes.

Q. Now, are you familiar with the relative floor space, the dancing area, at Mission Beach and Pacific Square?

A. Not exactly. Generally, I am.

(Testimony of Harold Eames Bishop)

Q. How do they compare, sir?

A. I would say that Pacific Square has slightly larger floor area.

Q. Do you know what the floor area at the Mission Beach [1072] Ballroom is?

A. I do not know exactly, no.

Q. Do you know what the floor area at Pacific Square is? A. I do not know exactly, no.

Q. By the way, tell me when was Miss Katleman your secretary, Mr. Bishop?

A. Miss Katleman, I believe, was employed in mid-summer of the year 1941, if my memory is right.

Q. To when? A. To when?

Q. Yes, sir.

A. I think she served as my secretary for approximately a year and a half. I am not quite sure on that.

Q. She was your secretary at the time this contract was made, wasn't she?

A. The November, 1941, contract, she was my secretary, yes.

Q. That is the one where your signature appears on it?

A. That is the one my signature appears on.

Q. That is the contract you discussed with her?

A. I did not discuss that contract with Miss Katleman.

Q. That is the one you felt rather elated about putting through?

A. I did not feel elated about putting the contract through. There was no elation connected with that contract, [1073] because the contract was a renewal of an original letter which was sent. It was just a continuance of that. I cannot take any personal glory. I did not ask for it. Mr. Dailard asked that it be put in that form.

(Testimony of Harold Eames Bishop)

Q. You say that was a continuation?

A. I am led to understand, and I am advised that there was an original letter which was presented to Mr. Dailard at the time the Pacific Square was—the building of the Pacific Square was contemplated. The letter was a similar letter to that which, in my opinion, the William Morris Agency and the General Amusement Agency possibly, gave Mr. Finley, stating that we would be happy to serve Mr. Dailard at the Pacific Square Ballroom in the event the ballroom was built. I have not seen that letter, but when I took over the booking of Pacific Square, they had at that time a first refusal arrangement on orchestras, and the letter—the contract which is drawn up is one which Mr. Dailard asked be drawn up.

Q. Well, if there was no change in it, then do you know why it was drawn?

A. The letter—I didn't read the original letter, so I can't make a statement on that.

Q. Oh, I see. But, in any event, you put through that contract there of November, 1941, didn't you?

A. The contract, the letter was originally submitted to [1074] me. I turned the letter over to Mr. Barnet. Mr. Barnet drafted the letter in its present form, and the signatures were then secured to the letter contract.

Q. Now, since Mr. Stutz has had Pacific Square, you have continued in the same manner to give him first refusal, to use your words, of every M. C. A. band that you have?

A. We had no intention of first refusal.

Q. Just answer my question, please. A. No.

(Testimony of Harold Eames Bishop)

Q. Tell me, you have supplied him with all of your bands, haven't you?

A. Yes, all of the bands that we had available for booking for him.

Q. And every band that you learned about that would be available for playing in the San Diego area you submitted to Mr. Stutz, didn't you?

A. Yes, that I knew was available, I submitted to Mr. Stutz.

Q. And you got commission on bands you offered to Mr. Stutz, didn't you?

A. Bands other than our own?

Q. Yes.

A. In the one instance, Georgia Auld, yes.

Q. What other bands did you get from any other company for Mr. Stutz? [1075]

A. There have been no other bands from any other company for Mr. Stutz up to the present time.

Q. Then it is 100 per cent?

A. Well, we have testified that there is Georgie Auld.

Q. Well, that has not yet played?

A. Georgie Auld was played in August of 1945.

The Court: I think we will suspend now, ladies and gentlemen, until the morning; 10:00 o'clock tomorrow morning. Remember the admonition.

(Whereupon, at 4:30 o'clock p. m., Thursday, February 7, 1946, an adjournment was taken until 10:00 o'clock a. m., Friday, February 8, 1946.) [1076]

Los Angeles, California, Friday, February 8, 1946.
10 a. m.

The Court: All present. Proceed.

Mr. Christensen: Mr. Bishop, will you resume the stand?

HAROLD EAMES BISHOP,

called as a witness by and on behalf of the defendants,
having been previously duly sworn, resumed the stand and
testified further as follows:

Cross Examination (Continued)

By Mr. Christensen:

Q. Mr. Bishop, I had asked you concerning the conversation with Mr. Michaud concerning the Tommy Dorsey orchestra? A. Yes.

Q. In addition to what you have told us about your telephone call and your wires to Mr. Michaud, and vice versa, you talked to him again when he returned to California?

A. I have talked to Mr. Michaud, yes.

Q. And you again tried to persuade him not to play at the Mission Beach Ballroom?

A. I may have repeated the text of the discussion that I had with him at the time of the telephone conversation, advising him—I don't recall whether I saw Mr. Michaud before the contract was signed, or after the contract was signed, actually as to point of time.

Q. Now, what are the duties of a personal manager of a [1078] band?

A. To my knowledge, the duties of a personal manager of a band is to counsel the band leader in his relationship with the agent, and to render him more personal

(Testimony of Harold Eames Bishop)

service than the agency is able to render him. He is the go-between the land leader and the agent. He counsels further relative to advertising promotion, and other activities he may have other than in the band business.

Q. Well, the composition of a name band consists, then, in addition to the musicians and to the leader, and a personal manager, some other personnel, does it not, sir?

A. Well, not all name bands have personal managers. I think quite a few of them do.

Q. All right. What other personnel does a band normally carry?

A. You mean in traveling?

Q. Yes, sir.

A. Well, they carry their musicians. They have a band boy. The personal manager in the great name bands is a man that does not travel with the band itself. They would have a road manager who handles the details of the band in arranging—

Q. All right. Now, let's see. In addition to a band boy, personal manager, road manager, what other personnel is there? [1079]

A. I think that is about the limit of the usual personnel.

Q. They carry, in addition, in many bands certain attractions, do they not, sir?

A. You mean—well, that is a part of the band's presentation.

Q. I had deliberately used the word "musicians" as distinguished from singers and other performers.

A. Most name bands have vocalists which have a reputation in their own right, yes.

(Testimony of Harold Eames Bishop)

Q. Well, in addition to singers who have a reputation in their own right, they also have other players who have a reputation in their own right.

A. You mean individual musicians?

Q. That is correct. A. Yes.

Q. As a matter of fact, a band leader strives to make a band one which is composed of outstanding personnel, does he not?

A. Well, I think that there may be some discussion there. It depends upon the cost of those personnels. If the band leader is a great name band leader, he might be able to do a maximum amount of business without having any personnel in his band that would run his costs up.

Q. Within the limitations of the costs, he seeks to do [1080] that?

A. I believe he always tried to get the best individuals to associate with them that they could.

Q. To the end that they are even advertised separately?

A. Not necessarily separately. I think they are advertised in conjunction with the band leader.

Q. You are perfectly right. I didn't exactly phrase my question correctly. Now, the band boy, what are his duties?

A. The purpose of the band boy, in my understanding, would be to set the musicians' stands up on the engagements, see that the bags and baggage get to the railroad station, see that the band leader and the musicians have water and sandwiches, and things along that line, if necessary, on a job; and he is just a general flunky.

(Testimony of Harold Eames Bishop)

Q. In addition to the personnel you have named, bands carry arrangers, do they not?

A. Well, some do and some don't. Some arrangers may travel with the band, and be individually also, in addition to arranging, musicians in the band. I don't believe in your great name bands the usual rule is that the arranger travels with the band. [1081]

Q. You do believe?

A. I do not believe that they do.

Q. That is right. Arrangements, however, are carried with the band?

A. The arrangements are carried with the band.

Q. In the formation of a name band, generally the leader decides on what class of music that he will play; for example, it would be swing or the other names—I am not familiar with it—but different classifications of music; is that right, sir?

A. The leader would choose the styling of the music.

Q. The styling; that is right. Then he will audition a large number of musicians in order to pick the musicians who can best play that style, is that right?

A. Well, in the event he did not know through experience actual musicians who could play the style, he may audition musicians to fill up the complement of his orchestra.

Q. And in addition to that, he would have to determine if he shall have predominantly stringed instruments or predominantly—what do you call the drums, percussions?

A. Percussions.

Q. Or wind instruments; that is correct, isn't it?

A. Well, that would be based on the styling that he would select.

(Testimony of Harold Eames Bishop)

Q. That is what I mean. [1082] A. Yes.

Q. And it involves many try-outs and auditions, doesn't it, sir? A. It may or may not.

Q. The personnel of—well, how many persons in the Tommy Dorsey orchestra?

A. Well, at the present time, I can't say that I am sure. I know that—

Q. I mean approximately.

A. There are 20 or 25, somewhere in there; there may be a few more than that.

Q. That is approximately the personnel in most of the name bands, isn't it, sir?

A. No. I think that that is probably a little larger than the great number of name bands.

Q. They will run from 15 to 20, will they not?

A. The usual run would run between 15 and 20.

Q. Do you know the price that was quoted to the Pacific Square for Tommy Dorsey?

A. Which price are you referring to? Tommy has played at Pacific Square—

Q. Well, at the time that he played instead of at Mission Beach?

A. If my memory serves me correctly, it was \$7,500 guarantee against 60 per cent of the receipts. [1083]

Q. And the price which he got for playing Mission Beach was what?

A. \$10,000 guarantee against 55 per cent of the receipts.

Q. So, actually, he had a larger guarantee at Mission Beach?

A. Well, the two jobs are not similar. The Mission Beach is a permanent engagement job of a week's stand.

(Testimony of Harold Eames Bishop)

The Pacific Square job is a one-night engagement of three nights duration. So they are two entirely different jobs in the category of price.

Q. The term "one-night stand," as you use it there means an engagement of one, two, or three nights, is that right?

A. Yes; that would be a fair definition.

Q. And anything of a week or more was a permanent engagement; is that correct, sir?

A. That is correct.

Q. The price, then, settled upon, \$7500 against 60 for Pacific Square, compared to \$10,000 against 55 per cent at Mission Beach, you would say that was a lower or higher figure quoted for Pacific Square?

A. You can't hardly compare the prices on one-night engagements against the prices of permanent engagements, Mr. Christensen. They are two entirely different jobs. One-night- [1084] ers always command a higher price than do permanent engagements.

Q. You prepared and distributed the advertising of the Tommy Dorsey engagement at the Mission Beach ballroom, did you?

A. It was prepared under my order; yes.

Q. And you furnished that to Mr. Finley or one of his associates for use in the newspapers, did you not, sir?

A. It was furnished by our publicity department. It may have been furnished direct or through Tommy Dorsey's own publicity staff. I do not quite recall. In many instances Mr. Dorsey supplied his own publicity material on his own engagements.

(Testimony of Harold Eames Bishop)

Q. Did he carry a publicity man or public relations man with him?

A. He has a publicity man, but he does not so-call carry him. I do not believe that he travels with him in his various travels throughout the country.

Q. He is in the employment of the orchestra as an entity?

A. He is in the employment of the orchestra; yes.

Q. At the Beach here in Los Angeles there are two first-class ballrooms there; one, the Aragon, and the other, the Casino Gardens; that is correct, isn't it?

A. Yes, sir. [1085]

Q. And at both places you play your top-flight bands, don't you? A. Yes; I would say so. Yes, sir.

Q. And those ballrooms are located one block apart?

A. Yes.

Q. At times you will play your very top bands against each other there, won't you?

A. As a matter of record, we have played top bands. However, the bands that we have played have been of different styling, Rhumba band against a Swing band, a show band against a Swing band.

Q. Do you personally take care of both of those accounts at Ocean Park, sir?

A. No. I book the Aragon ballroom.

Q. You book the Aragon; and who books Casino Gardens? A. Hal Howard.

Q. Hal Howard. And you furnish them with bands there at both places the year round?

A. The Music Corporation does; yes, supply them with bands.

(Testimony of Harold Eames Bishop)

Q. When I say "you" I am, of course, meaning the Music Corporation of America as well. By the way, who paid your expenses for your trips to San Diego there in connection with the Dailard matter?

A. The Music Corporation of America. [1086]

Q. Then, at all times you were acting in your capacity as a representative of Music Corporation of America, were you, sir?

A. I was employed by Music Corporation of America; I was drawing salary and they were paying my expenses.

Q. You were acting in your capacity as a representative of that company, weren't you?

A. I would say that I was.

Q. Oh, yes. This engagement of Bob Chester and Jack Teagarden at the Pacific Square; you recall the incident when they played together?

A. Yes.

Q. Did Mr. Dailard request that booking or did you submit it?

A. I frankly don't know just exactly how that booking did originate. The policy of submitting bands, if there is—

Q. Well, if you do not remember—

A. I don't recall. Yes.

Q. —why, that is the answer. Does the Music Corporation of America offer bands to Mission Beach ballroom?

A. Corporation of America has offered bands to Mission Beach ballroom.

(Testimony of Harold Eames Bishop)

Q. You are referring now to only the three instances: Jack Teagarden and Bob Chester and Ted Fio Rito, aren't you?

A. Those are the three that come immediately to mind; [1087] yes.

Q. Well, there were no others that you know of; that is correct, is it not?

Mr. Warne: May we ask that the time be fixed?

Mr. Christensen: During the year 1945, sir.

Mr. Warne: And after the lawsuit was filed?

Mr. Christensen: During the year 1945, sir.

The Court: Well, I think it should be a little more specifically split than that. In other words, the letter of February 25th may have an important bearing on that, Exhibit K.

Those are the three bands that you referred to in that letter?

The Witness: Yes, sir.

Q. By Mr. Christensen: Are there any others that come to your mind as having been submitted during the year 1945, sir?

A. Not that I can—not that I can recall right now.

Q. Do you recall what the price quoted for Jack Teagarden was?

A. The price quoted for Jack Teagarden, I believe, was \$2,500 guarantee against a privilege of 50 per cent for a 3-day booking.

Q. Do you recall the price for which that same band was quoted to Pacific Square? [1088]

A. On following engagements?

(Testimony of Harold Eames Bishop)

Q. No. I mean on the engagement that we are speaking of now, where Bob Chester and Teagarden played together?

A. I do not recall the price that the band was quoted. I know that the band was paid—I think I had better check my records to be absolutely sure. I think it was \$2,500 flat, with no percentage.

Q. Do you recall the price for which Bob Chester was quoted to Mr. Finley for engagement at Mission Beach?

A. I believe—and I would have to verify my records to be absolutely certain—that that was—I do not recall the quoted price, but the contracted price, I believe—which I would like to verify on my records—was \$2,500 flat.

Q. And the quoted price to Mr. Finley was what, sir?

A. The quoted price to Mr. Finley for a three-day booking was \$2,500 guarantee against 50 per cent.

Q. Will you give me the date of that conversation you have related as having taken place between you and Mr. Finley on the boardwalk down here at Ocean Park, sir?

A. I can only give you just a general estimate of that date.

Q. Will you, please?

A. I think it was a weekend some time during July, as I recall. It was in mid-summer. [1089]

Q. You could help us if you could fix it any more definitely. I would appreciate that, sir.

A. Actually, I don't even recall the band that was appearing at Casino Gardens. I am sorry. I won't be able to help you fix that any more definitely.

Q. Very well. I believe you made the statement that the \$10,000 booking with Mr. Finley was the highest that

(Testimony of Harold Eames Bishop)

Mr. Dorsey had received for any booking; is that correct or not, sir? A. I did not make that statement.

Q. That is not true, is it?

A. I do not know whether it is or whether it isn't.

Q. The booking there at Mission Beach of Tommy Dorsey was handled by Music Corporation of America, that is to say, the physical preparation of the contract?

A. Yes.

Q. And for that you received—"you"—M. C. A. received only ten per cent?

A. Received our regular commission as stipulated in the contract.

Q. That was ten per cent on that engagement, is that right?

A. It was ten per cent on that engagement; yes.

Q. Whereas, if you had booked him into Pacific Square for this weekend at \$7,500 you would have received 20 per cent, [1090] wouldn't you?

A. No. We would have received the commission for a one-night engagement, which would have been in the instance of Tommy Dorsey 15 per cent.

Q. Has he a special rate with M. C. A.?

A. I wouldn't say that there is any special rate; no.

Q. Well, your rate of commission is 20 per cent, is it not, on one-night engagements?

A. In many instances it is 20 per cent; in many instances, at 15. There is no special dispensation, to my knowledge, between the two.

Q. What determines whether it is 15 or 20, if you know?

A. I can only qualify that by saying that on all the bands that I have signed management contracts for the

(Testimony of Harold Eames Bishop)

Music Corporation of America, the contracts were secured on the basis of 20 per cent commission. The contract with Tommy Dorsey on 15 per cent I did not secure with Mr. Dorsey, so I do not know what the nature of the discussions were.

Q. You told us about a conversation which took place down at the Trianon ballroom on the evening or late afternoon of November the 8th of 1944, that being the date on which the Council made the actual awarding of the bid. You recall that, do you? [1091]

A. I recall the matter, yes.

Q. In addition to yourself, Mr. Bishop, will you state again who was present, sir?

A. Mr. Howard was present, and for at least a portion of the meeting there was another gentleman there, who I do not recall.

Q. That was Mr. Mirken, wasn't it?

A. I do not recall his name. I do not know.

Q. It was the resident manager there, wasn't it, that you are referring to?

A. I wouldn't say for certain. It might have been.

Q. Now, at that time and place did not Mr. Finley say to you that he, Mr. Finley, thought that you had hit a new low in lowness by coming down to appear before the City Council to testify as to Dailard having an exclusive on bands in San Diego?

A. Mr. Finley made no such statement to me.

Q. At that time and place did Mr. Finley say to you that it was the rottenest thing in calling Ralph Wonders of General Amusement and asking Ralph Wonders to come down and appear with you?

A. He made no such statement.

(Testimony of Harold Eames Bishop)

Q. At that time and place and in the presence of the persons I have mentioned, did Mr. Finley also say to you that the lowest thing of all was in calling Jack Flynn on the [1092] telephone a week previous to that time and telling Flynn that Dailard had been awarded the lease at Mission Beach?

A. He made no such statement.

Q. Did Mr. Finley at that time also say to you that you had requested Flynn to write a letter to Dailard refuting his letter to Finley listing the bands?

A. Would you repeat that question, please?

(The question was read.)

A. There was no such discussion.

Q. Now, I gathered from your statements that you didn't regard Mission Beach Ballroom as very important to you or to Music Corporation of America; is that right?

A. Mission Beach Ballroom was important to Music Corporation of America.

Q. And in what way was it important, sir?

A. It was important primarily in the competitive field, wherein the operation that had been maintained at Mission Beach prior to that time enabled the bands which we represented to take out considerable grosses at Pacific Square. In the opinion of myself, there was not room in San Diego for two name ballroom operations; operating competitive to each other, they would both lose money because of the lack of demand for that particular type of business or entertainment in that area.

Q. Now, since both you and Mr. Dailard didn't think so [1093] much of Mission Beach Ballroom, will you tell me why you two made such an effort to keep Mr. Finley from getting it?

(Testimony of Harold Eames Bishop)

Mr. Warne: If the court please, I object to this witness testifying as to why Mr. Dailard did something. I have no objection to any conversations with Mr. Dailard, but I do object on that ground.

The Court: I think the question is objectionable. Sustained.

Mr. Christensen: I will withdraw it. That is all. Thank you.

Redirect Examination

By Mr. Warne:

Q. May I have a question or two, if you please?

A. All right.

Q. With reference to the Misison Beach Ballroom—
Mr. Warne: If I may stand here, your Honor.

The Court: Certainly.

Q. By Mr. Warne: With reference to the Mission Beach operation you have expressed an opinion as to its being a possible successful operation. What type or character of operation did you believe could be successful there?

A. The operation that had been previously successful at Mission Beach, which was the presentation of western orchestras.

Q. Of western orchestras. Give the names of some of them. [1094]

A. Bob Wills and his Texas Playboys, for one, and Happy Perryman; bands of western calibre and of name value.

Q. Your opinion, is that based now on a conclusion or on different types of entertainment which were offered there?

(Testimony of Harold Eames Bishop)

Mr. Christensen: That is objected to as a conclusion.

Q. By Mr. Warne: Speaking from experience only.

The Court: Overruled.

The Witness: From actual experience, in having played Bob Wills at the Mission Beach Ballroom for a considerable period of week-ends, the grosses were very satisfactory, and the experience led us to believe that there was a tremendous demand in that area for that particular type of entertainment.

Q. By Mr. Warne: Now, with reference to Mission Beach and bands at Mission Beach, there have been no bands or orchestras suggested or offered to Mr. Finley since this law suit was filed; is that correct? At Mission Beach, I am referring to.

A. Since the law suit was filed?

Q. Correct, which was in March of last year.

A. There is a vague recollection of a conversation that was had with Mr. Finley pertaining to the submission of Bob Wills.

Q. Do you have any distinct recollection about it?

A. I have no distinct recollection about it, however. [1095]

Q. I see. Now then, has Mr. Finley requested of you, or of any one else in M. C. A., so far as you know, the booking of any bands at Mission Beach since he filed the law suit? A. Not to my knowledge.

Q. By the way, you answered a number of questions with reference to how bands operate, are gotten together, and so forth. Where did you get all that information about—I will put it this way. I withdraw that. When

(Testimony of Harold Eames Bishop)

did you first start to become interested in the operation of bands or orchestras?

A. When I first became associated with Music Corporation of America, approximately eight years ago.

Q. Did you ever indulge in it in an amateurish sort of way, before you got a job there?

A. No, I did not.

Q. Your experience has been by reason of what?

A. My experience has been by reason of my association in the business of booking orchestras with Music Corporation of America.

Q. And your acquaintance with musicians, I take it, and band leaders?

A. That is correct.

Q. You spoke of one-nighters commanding a higher price, and then the figure of \$10,000.00 has been suggested against \$7,500.00. How do you figure \$7,500.00 being a higher price [1096] than \$10,000.00?

A. Well, the \$7,500.00 was for a three-day engagement. The \$10,000.00 was for a six-day engagement.

Q. I see. In other words, you are then figuring or computing it on the basis of the daily return; is that correct?

A. On the basis of the daily return.

Q. You speak of the booking at the Aragon and the playing of orchestras at the Aragon and Casino Gardens. Do any other agencies book into Casino Gardens, do you know?

A. Yes, I believe that General Amusement has had orchestras in Casino Gardens. In fact, I think that at one time or another all agencies have had orchestras in Casino Gardens.

Q. With reference to this matter of not putting a swing orchestra against a swing orchestra, I think you

(Testimony of Harold Eames Bishop)

used that term, at the Aragon and Casino Gardens, would you elaborate on that, just what you mean in that regard?

A. There is a distinct following for different types of music. There are people who particularly like the swing band music and do not care at all for the sweet rhumba type music. I think the best contrast is the actual contrast between the booking of Xavier Cugat, who is a rhumba band, and I believe the time Cugat played either Jimmy Dorsey or Tommy Dorsey or Harry James, one of those three bands, was at [1097] the Casino Gardens, and they are equally great in their own right. Both places were able to enjoy a tremendously successful business because the demand did not conflict. In the Aragon you saw almost an entirely different type of people than you saw at the other, in the Casino Gardens Ballroom. You saw a lot of Mexican element, of people who wanted to do the rhumba type of music, as opposed as the younger bobby-sox type element that liked the swing music at Casino Gardens.

Q. Now, do you know whether Teagarden's band and FioRito's band played at Pacific Square after this engagement—I believe the first engagement was in February?

A. Yes, both Jack Teagarden and Ted FioRito have played engagements at Pacific Square since that time.

Q. Have they been booked in there more than once, either one of them?

A. To my best recollection, Mr. Jack Teagarden's orchestra has been booked only once; Ted FioRito's orchestra has been booked twice.

Mr. Warne: Now, if the court please, the questions I want to ask now are really direct, and I would ask leave to go into them. There is a matter which I overlooked

(Testimony of Harold Eames Bishop)

going into in the first instance. It is an entirely different subject-matter, if I may.

The Court: Very well.

Q. By Mr. Warne: Do you know Mr. Birnie Cohen? [1098] A. Yes, I do.

Q. You saw him testify here as a witness against you in this law suit? A. I did.

Q. You recall that the law suit started here on the 29th of February? A. Yes.

Q. Or, correction,— A. Tuesday. Of January.

Q. Of January, rather? A. Yes.

Q. When next, before that time, the time he appeared as a witness, did you see Mr. Cohen?

A. I saw Mr. Cohen on the Friday preceding the commencement of this law suit.

Q. Where? A. In my office.

Q. That is on Wilshire Boulevard?

A. On Wilshire Boulevard.

Q. Did you have a conversation with him at that time? A. Yes, I had a conversation with him.

Q. Any conversation about him testifying as a witness here?

A. There was no particular conversation about testifying as a witness in this trial, no. [1099]

Q. Will you relate the conversation at that time?

Mr. Christensen: To which we object as hearsay.

The Court: I don't recall the foundation being laid for that.

Mr. Warne: It was, your Honor.

The Court: You have transcript here. You can refer to it. Let's examine the record. It may have been, but I don't recall it.

(Testimony of Harold Eames Bishop)

Mr. Warne: At page 135, your Honor.

The Court: Yes, that is correct. You are correct.
Objection overruled.

Mr. Warne: Would you read the question, Miss Reporter, please?

(The question was read.)

The Witness: A. I knew that Mr. Cohen was no longer—I had been advised; he had advised me—employed at the Casino Gardens, and I asked him, as a matter of personal observation, what his opinion of Mr. Larry Finley was, just after—because he had had experience with him for a period of time, and Mr. Cohen stated to me in very definite terms that, in his opinion, Mr. Finley was a phony, and he said something about being a two-bit chiseler.

Q. By Mr. Warne: Was this conference you had with Mr. Cohen one that you had solicited or arranged?

A. No, I had no appointment with Mr. Cohen. I didn't [1100] know he was coming in at all.

Q. Had he prior to that time, to that occasion, come to your office or come to the office of the Music Corporation of America?

A. Mr. Cohen would come to the office quite regularly, just to sit down and have conversations.

Q. And he bought bands on numerous occasions?

A. Yes, he did.

Mr. Warne: Cross-examine.

Recross Examination

By Mr. Christensen:

Q. Did you tell him, did you say to Birnie Cohen, "Well, Birnie, I don't think a man that will pay one of

(Testimony of Harold Eames Bishop)

his employees half of his salary all the time that he is in the armed forces of our government is a two-bit chiseler”?

Mr. Warne: Just a moment. I object to that question upon the ground there is no foundation laid, it is argumentative in form, it is an attempt to interject new and different items in this law suit, not relative to the examination of the witness made at first, is wholly immaterial, and calls for his conclusion and opinion.

Mr. Christensen: I am asking if he said that to Mr. Cohen.

The Witness: A. No.

Mr. Christensen: All right. [1101]

The Court: He has answered it now. Read that question, please, Mrs. Zellner.

(The question was read.)

Mr. Warne: If the court please, may I request, inasmuch as the witness answered the question before your Honor had ruled, that the answer be stricken and that my objection be ruled upon?

The Court: I think so. The motion to strike is granted. Ladies and gentlemen, you will disregard that answer. The objection is sustained to the question.

Q. By Mr. Christensen: Well, did you say anything to him when he told you these things?

A. No, it was just a general discussion there for a few minutes about Mr. Finley.

Q. Tell me the discussion. It wasn't all Birnie Cohen talking, was it? You said something?

A. For the most part, it was Birnie Cohen talking. I wanted to learn what his opinion of Larry Finley was.

(Testimony of Harold Eames Bishop)

Q. What did you say to him?

A. "What is your opinion of Larry Finley after you have been in business with him for a period of time?"

Q. That is all you said to him?

A. Well, I believe that was all we said about Mr. Finley. After he had given me his opinion of Mr. Finley, we went on to other subjects, and then he went over to Mr. Howard's [1102] office.

Q. What other subjects?

A. That I discussed with Mr. Cohen?

Q. Yes.

A. The subject of having a meeting of a group of people who are members of our company for the purpose of playing golf. There is a little South of the Techachapi Club, and we occasionally played golf, and at that time we discussed the possibility of having another golfing session.

Q. What was the business conversation, if any, there was on that occasion between you and Mr. Birnie Cohen?

A. There was no business conversation between myself and Birnie Cohen.

Q. Was there any business discussion between Mr. Cohen and any one else, while you were present?

A. Mr. Cohen was in my office, and I believe Mr. Howard came in my office, and then he went into Mr. Howard's office. I did not go in. I don't know whether business was discussed with Mr. Howard.

Q. Did Mr. Cohen tell you at that time, or did you ask him if Mr. Finley made money for Casino Gardens while he was managing it?

A. I didn't ask him that question, no.

(Testimony of Harold Eames Bishop)

Q. Now, you say that you believe that you had offered to Mr. Finley Bob Wills. You say you have a vague recollection [1103] of that?

A. I have a vague recollection that possibly that conversation took place by telephone.

Q. Is there anything more definite than the statement that you have just now made, that you have a vague recollection of the possibility of such a telephone conversation?

A. The only thing is I have a recollection, a vague recollection, of such a call.

Q. Now, you said that at the Casino Gardens and at the Aragon you played these two great attractions; is that right? You were referring to Cugat and Tommy Dorsey?

A. They are both great attractions, yes, sir.

Q. By that you mean it would bring people from a long distance to dance to them?

A. Well, through the drawing area, wherever people are interested in going, they will go.

Q. Well, it is not uncommon at all for people to make a trip of miles to go to a ballroom to dance?

A. Well, I don't know that you can set any general rule as to how far people are willing to go for any particular type of attraction. They come from the competitive—or, an area of demand, for the most part.

Q. Now, the ballroom there at the Beach draws from all parts of Los Angeles, doesn't it?

A. I believe, in my opinion, my own personal opinion. [1101] I believe it does draw from pretty generally all of Los Angeles.

(Testimony of Harold Eames Bishop)

Q. Likewise, for example, the Palladium, which is located in Hollywood, draws from all over Los Angeles?

A. Yes.

Q. Then it is true that when a particular big name attraction is playing at a location, people will go many miles to dance to it?

A. Yes, if there is a great name attraction playing. The reason it is a name attraction is because it is able to draw people and people will be drawn to great name attractions.

Q. You were here when Mr. Dailard testified that people left San Diego and traveled up to the Palladium when he couldn't get name bands, weren't you?

A. Will you read that question, please?

(The question was read.)

Mr. Doherty: I think, your Honor, that is an unintentional misconstruction. Mr. Dailard, as I remember, said that in his ballroom people who had been at the Palladium would ask him about his future attractions; not that they traveled up here merely to the Palladium, but that they had been to the Palladium and asked him about his attractions.

Mr. Christensen: I can refer your Honor to the record.

The Court: There is nothing before the court. I am not going to enter into a dispute as between counsel as to what [1105] the record shows. You have the record here. There is no objection to the question.

Q. By Mr. Christensen: Will you answer the question?

A. I evidently wasn't paying attention during the time Mr. Dailard made that statement.

(Testimony of Harold Eames Bishop)

Q. From your experience, would you say that people do travel the distance, say, from San Diego to dance at the Palladium?

A. I know of no definite experience of any person that has traveled that far. There is a possibility that they could have, but I don't know of any one instance where the person has traveled that far just particularly to hear a band. It is possible that they could have.

Q. You say you decided that Mission Beach was not the place to play name bands; is that right?

A. I don't believe that I made that statement. I said that— I don't know that I made that statement.

Q. What is the situation? Did you?

A. Well, the situation—

Q. I say, did you?

Mr. Warne: Just a minute. The record is the best evidence on that.

Mr. Christensen: No. I say, did you decide that?

Mr. Warne: Oh, I am sorry.

The Witness: That Mission Beach is not the best place [1106] to play name bands?

Q. By Mr. Christensen: Yes.

A. I, in my own mind, believe in a comparison between Mission Beach and Pacific Square, that Pacific Square on a year-around operation will be able to serve the dancing demands of the people of San Diego much better than the Mission Beach Ballroom.

Q. And having decided that, then you proceeded to give all of the name bands to Pacific Square; is that right?

A. The bands were anxious—

Q. No, you can tell me yes or no.

A. I can't answer that yes or no.

(Testimony of Harold Eames Bishop)

Mr. Warne: I submit the answer started is the correct one, and I think the witness should be permitted to finish his answer.

The Court: I am afraid I wasn't paying as close attention at this point as I should have. Will you read that, please?

(The record was read.)

The Court: I don't know whether the witness was interrupted by counsel or not.

Mr. Warne: He was.

The Court: He should not be interrupted by any counsel. He should complete his answer, and if it isn't satisfactory to the questioner, the questioner can move to strike it out. Do not interrupt the witness. Proceed. [1107]

Q. By Mr. Christensen: Go ahead.

A. The bands were anxious to make the most money that was possible for them to make. I believe that most of the bands which my company represents had at one time or another, or a great majority of them, appeared at Pacific Square and made an excellent amount of money out of Pacific Square. So far as booking the place, when a program or itinerary was discussed with a band leader, the band leader would say, "Immediately following"—for example, would say, "Immediately following my closing at the Palladium, I would like to play at Pacific Square," and the arrangement would be negotiated.

Mr. Christensen: I move to strike that as hearsay.

The Court: Motion denied.

(Testimony of Harold Eames Bishop)

Q. By Mr. Christensen: This, you say, is conversation you had privately with some band leaders?

A. Well, as a general rule, with all band leaders when it came to a discussion of their itinerary, yes.

Q. Now, Sammy Kaye, for example, you know him?

A. Yes.

Q. Did he tell you he wanted to play Mission Beach?

A. Well, you are going back, I believe, to 1942 now, or early in 1943.

Q. You know he is coming out here now, don't you?

A. Yes, I know he is. [1108]

Q. That is the occasion I am talking about.

A. I don't know whether Sammy Kaye has requested that or not. Mr. Barnett had discussions with Mr. Kaye's personal manager, and he asked for the submission of an itinerary of engagements for him. That itinerary was drawn up and has been forwarded to him for his approval or disapproval.

Q. That is the practice in your company, to make up these itineraries for your bands; is that right?

A. Well, I possibly used the word "itineraries" a little bit different, in its usage in our business. An itinerary in our business is a recapitulation of all the information on the contracts which have already been re-negotiated, or, negotiated. So that a band leader will not have to carry a complete file of contracts with him, on one or two sheets of paper there is a recap of all the dates that the band leader has in this particular schedule of dates, and so he can see and refer to this one sheet of paper and have all the information that is contained in possibly 15 or 20 contracts. And that is what we call an itinerary.

(Testimony of Harold Eames Bishop)

Q. So that if you have a band coming out here or available in the Los Angeles or San Diego area, then you book it into Pacific Square?

A. If we have a band that is available in this area, and there is an opening at Pacific Square, and if, in my opinion, the Pacific Square—the band would be able to [1109] realize more money for itself, I would suggest or recommend that the band leader play Pacific Square.

Mr. Christensen: That is all. Thank you very much, sir.

Redirect Examination

By Mr. Warne:

Q. Am I to understand, then, you would be concerned only with the maximum return to the band leader?

A. That is our primary concern, yes.

Mr. Warne: No further questions. [1110]

Mr. Warne: Mr. Barnett.

The Court: I believe we will make better time by taking our recess now than continuing along with Mr. Barnett's testimony.

Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition and keep its terms inviolate.

(Short recess.)

The Court: All present; proceed.

Mr. Warne: Mr. Barnett.

LAWRENCE BARNETT,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you spell your name completely? It has several different spellings in the record.

The Witness: Barnett, B-a-r-n-e-t-t.

The Clerk: And the Lawrence is "u" or "w"?

The Witness: L-a-w-r-e-n-c-e.

Direct Examination

By Mr. Warne:

Q. Commonly referred to in the conversation and trade as "Larry"? A. Correct.

Q. Your business or occupation, Mr. Barnett? [1111]

A. I am a salesman.

Q. Connected with what company?

A. Music Corporation of America.

Q. Are you an officer of that company?

A. I am.

Q. What office do you hold? A. Vice-president.

Q. How long have you been with the Music Corporation of America? A. Approximately ten years.

Q. And in what particular department, if you are in a particular department?

A. I am in the band department.

Q. And you have been in that department ever since you have been with M. C. A.? Let us call it "M. C. A."

A. Yes.

Q. Prior to that time you were engaged in what occupation?

A. I was going to college and I had a booking office in college.

(Testimony of Lawrence Barnett)

Q. Booking what? A. Orchestras.

Q. Was that for a commission? A. Right.

Q. Did you have any other paid employment prior to the [1112] time that you came with M. C. A.?

A. I worked for three months with the Columbia Broadcasting Company.

Q. In what capacity? A. As a salesman.

Q. Selling attractions? A. Selling bands.

Q. As an officer of the company have you any particular occupation or duties insofar as the band department is concerned?

A. I am coordinator of the West Coast Band Department.

Q. Of the West Coast Band Department?

A. Yes.

Q. Will you tell us about other band departments? Are there other band departments elsewhere in the United States?

A. There are other band departments in New York, Chicago, Cleveland, Detroit, Dallas, and San Francisco is combined with the Los Angeles Band Department.

Q. Well, as coordinator, does that mean that you have charge of it generally? A. Right.

Q. And Mr. Bishop works under you?

A. With me.

Q. With you? [1113] A. Right.

Q. But under your general supervision, is that correct? A. Right.

Q. The same is true with Hal Howard?

A. Right.

Q. What about Lyle Thayer who has been referred to here? A. That is correct.

(Testimony of Lawrence Barnett)

Q. And a number of other salesmen?

A. Approximately 11.

Q. 11 salesmen who are under your jurisdiction generally in the Los Angeles office, is that right?

A. Los Angeles and San Francisco.

Q. And any other employees of that sort who are under your general control or jurisdiction?

A. Well, the secretaries that work for the men.

Q. I see. In other words, you have general charge of that whole end of the business, is that correct?

A. That is correct.

Q. And the band department—I believe you call it that—in your business, the band department is now on Wilshire Boulevard, separate from the other M. C. A. enterprises over on Burton Way?

A. Yes, sir.

Q. Are you an officer of any other corporation or affiliated corporation? [1114]

A. I am secretary of Movie Corporation.

Q. Do you do any work in Movie Corporation?

A. I don't do any work for them; no.

Q. I see. With reference to other agencies, are you familiar with other agencies that are in the band business or the band booking business?

A. I believe I am.

Q. And what are the principal other agencies?

A. William Morris, Frederick Brothers, General Amusement, Moe Gail. There are a lot of them. I can't remember exactly the exact names.

Q. These you have mentioned, Frederick Brothers, for instance, that has been mentioned here; is that one of them?

A. Yes.

(Testimony of Lawrence Barnett)

Q. These other agencies, do they have offices in the principal cities throughout the United States?

A. They do.

Q. And they represent other bands and attractions?

A. Right.

Q. What would you say with reference to competition between the agencies as to representation of bands and selling—that is the term that is used—of bands?

A. I think it is very competitive. There are numerous agents in every town that you try to sell a band in.

Q. There has been some mention here of splitting [1115] commission or splitting commissions. Have you any knowledge of splitting commissions in the selling of bands between agencies on occasions?

A. It is very common.

Q. It is very common? A. Yes.

Q. Not just in San Diego? A. That is true.

Q. And with reference to splitting of commissions on particular orchestras or bands, does that occur on occasions? A. It does.

Q. Will you explain, if you please?

A. We have split commissions on several bands with William Morris. They have given us a commission and we have given them a commission. In fact, we gave them all the commission on an Artie Shaw booking.

Q. That was in San Diego, you mean? A. No.

Q. Elsewhere?

A. It was elsewhere, all up and down the Coast. We gave them half the commission on Al Donahue; we gave them half the commission on Al McIntyre. These bookings were up and down the Pacific Coast.

(Testimony of Lawrence Barnett)

Q. What about Tucker?

A. Orin Tucker, we split commission with the Frederick [1116] Brothers.

Q. Frederick Brothers? A. Right.

Q. And you split commission with G. A. C.?

A. We split commission with General Amusement on engagements to Meadow Brook and Cedar Grove, New Jersey.

Q. What was that, a ballroom?

A. That was a ballroom—a night club, I would call it, a combination of the two.

Q. On splitting the commissions there, if you know about that, how does that work?

A. Well, they were servicing a spot for the owner of the spot, Frank Daly, and they apparently needed bands and they asked us for certain bands available. We had bands available for a time, and they asked us for part of the commission and we gave it.

Q. That is common in the business?

A. That is common in the business.

Q. You know that you are a licensed agent?

A. Right.

Q. Are you licensed as a sub-agent? A. Right.

Q. Personally? A. Right.

Q. And the other salesmen that you have, are they [1117] licensed sub-agents, if you know?

A. Correct.

Q. By the American Federation of Musicians?

A. Correct.

(Testimony of Lawrence Barnett)

Q. In the representation of bands just what do you understand by that as far as your company is concerned?

A. Well, we counsel them, aid and help them in any manner we possibly can, and represent them in getting engagements for them.

Q. Well, you say you counsel them. What do you counsel them about?

A. Well, the best way would be to give you an example, possibly.

Q. All right; let us have it.

A. Joe Reichman comes in the office and he says he would like to go to New York.

Q. Joe Reichman is a band leader, is that correct?

A. Correct.

Q. Go ahead.

A. He says, "Where can you book me?" So we try to figure out where we can book him in New York. He says, "I have a payroll of so much for my orchestra," and tells us what price he wants for the band. We go around to the various hotels and cafes to see if we can get him engagements that will pay him that type of money. And we go back to Reichman [1118] and say, "We can get you the following engagements," and sometimes he will take the engagements and sometimes he will turn them down. We will show him how the time is good on this radio, and tell him, "It will help you and do you a lot of good."

Q. Is it part of your business to know who has one of the spots or places where employment can be obtained?

A. That is right.

(Testimony of Lawrence Barnett)

Q. And is it part of your business to assist in the development of the operations where employment for band leaders can be obtained?

A. We try to create employment for our band leaders.

Q. With reference to this matter of price, you mentioned Reichman. Any other band leaders? How is the matter of price that is to be paid to them and for them and their orchestra determined? How is that determined?

A. The orchestra leader himself decides on the price. He can accept or reject an engagement.

Q. Well, let me ask you this: Is there a general price for which an orchestra plays ordinarily during a given period?

A. No; there is no general price at all.

Q. Insofar as any one orchestra—let us take Reichman—do you know what price he is getting for the engagement, or asking? [1119]

A. Yes. He asks different prices. Sometimes he takes one price in Los Angeles, because he wants to stay here and has a home here, and asks a different price in New York.

Q. That is true of all of the others?

A. Practically all the leaders. It depends on where they want to go. If they are anxious to go to Los Angeles, they might take a better price than they would to go to New York. If they don't want to go to New York, they will probably ask for more money, for New York than they would for Los Angeles.

(Testimony of Lawrence Barnett)

Q. Do they ask you with reference to a price when they suggest one? Do they ask you to counsel and advise on it?

A. They ask us to help them. They usually say, maybe, what some of the other orchestras have been getting on that job, and we try to tell them.

Q. There has been a mention of gross, or, rather, a percentage of gross here in the case of Tommy Dorsey and, I believe, some of the other contracts. Is it a custom in the trade to put the compensation on the basis of gross receipts?

A. It is a custom in the trade; yes.

Q. What is the usual top?

A. The usual custom is 60 per cent.

Q. That is what the orchestra leader usually wants to get?

A. Correct. [1120]

Q. And is that what you usually try to get for him?

A. That is what we try to get.

Q. Does he sometimes take less?

A. Sometimes he will take less if he wants the engagement.

Q. Do you recommend he take less?

A. Sometimes, if the guarantee is higher.

Q. With reference to other agencies do you know how they work and operate in that regard?

A. Well, I imagine—

Q. Well, not you "imagine." You have not worked for any other agency, have you?

A. I haven't worked for any other agency.

(Testimony of Lawrence Barnett)

Q. Well, I will keep away from it. With reference to bands, there has been a lot of talk here about great bands. I believe Mr. Bishop just referred to name bands and other such things, and there has been a reference to Tommy Dorsey and the fact that he, I believe, received \$10,000 for playing one week. Let me ask you this: The price of \$10,000, is that commonly paid for orchestras per week? A. No; it is not.

Q. At a ballroom?

A. That is very high. In fact, I don't remember of ever hearing any other ballroom paying as high a price.

Q. Let me ask you this: Are there other orchestras in [1121] the United States, or many other orchestras who are comparable to Tommy Dorsey in price or in the price that they can demand for services?

A. Very, very few.

Q. When you say "very, very few," could you number them or could you put it in numbers?

A. Well, I don't imagine there are over ten, if there are that many.

Q. Are those ten always in Los Angeles or the Western territory?

A. No; they are spread out through the United States.

Q. Where is the principal demand for orchestras, dance orchestras of this character?

A. On the East Coast.

Q. And that works out of what office?

A. New York office.

(Testimony of Lawrence Barnett)

Q. The ten, you say, are spread throughout the United States. Do you know any places that can use these orchestras, that make demand on them for their services?

A. We know the places, because practically everybody wants the top bands, but they are not always available for them.

Q. That is, a man can only play one place?

A. That is right; at a time.

Q. At a time. And these ten that you refer to now, do [1122] you know how they are spread throughout the United States at this time?

A. Tommy Dorsey is in New York.

Q. Cugat's name has been mentioned.

A. Cugat is in Florida; Les Brown is in New York. If I had a list, I could probably tell you exactly where they are. We keep that list.

Q. Well, how many of them are in Los Angeles territory at the present time?

A. Harry James, Gene Krupa. That is about the only two that are in the town, that are playing dance engagements, available for dance engagements.

Q. In other words, those are the only two that are present at the present time?

A. Correct.

Q. Would you say that that condition generally obtains, that is, that spread of these top ten, if you want to call it that, throughout the United States?

A. I would say that is, generally, throughout the year.

Q. You never have the ten out here at one time?

A. No.

Q. Let me ask you about the availability of these types of bands, generally, in November, December and January of—rather, November and December, 1944, and

(Testimony of Lawrence Barnett)

January, 1945, on the West Coast, of their availability here. First, let me [1123] ask you this question: How far ahead are those types of bands usually booked?

A. The larger the name band, the further ahead we usually book them.

Q. And that will extend how far?

A. Oh, it can extend up to a year. We usually book them for dance engagements, maybe 45 days to 50 to 90 days ahead.

Q. Have you any present recollection of the bands that were available in the months that I mentioned here in Los Angeles at that time? If you have not any present recollection, I will withdraw the question.

A. I have records. It is so much easier for me to look it up, but I can tell you in a minute.

Q. Now, there are other bands that are not of the big ten—let us call it that—or of this Tommy Dorsey category. What other price bands are there that are mentioned as being amongst the leading dance orchestras in the country?

A. It is a very broad question.

Q. Well, all right. Is there any way, by way of price or category, that you can fix it? Let us say \$3500 bands? Are there bands that sell for that?

A. There are; yes.

Q. Any that sell for \$5,000?

A. Correct. [1124]

Q. And these big ten, at \$5,000 a week, would you say that they played for that amount of money?

A. Some do; some play for more, and maybe might take an engagement for less, depending how badly they wanted it.

(Testimony of Lawrence Barnett)

Q. How about \$3,500; does that reach down to a category of a number of bands?

A. That happens to be a larger category of bands.

Q. How many would you say would fall into that category? A. I imagine about 30 bands.

Q. When you get down to \$2,500 that would take in about how many? A. I imagine 75.

Q. That is, throughout the country?

A. That is throughout the country.

Q. And includes all agencies?

A. No. That includes our bands, because I wouldn't have these exact figures on the other agencies' bands.

Q. What about the other agencies; have they name bands in each one of these categories?

A. I imagine they do; yes.

Q. Do you know all the bands that they have, or at least some of them? A. Yes.

Q. In the top category, for instance?

A. Yes. [1125]

Q. And that is true of all of it, or I might say of the General Amusement? A. Yes.

Q. It is true of William Morris? A. Yes.

Q. Do you remember an occasion that these contracts—well, first, an original contract that has been introduced in evidence here, Defendants' Exhibit E, do you remember the occasion of that being executed? A. Yes.

Q. The general lawyer-like language is in there. Who composed it?

A. I don't remember exactly who composed it.

Q. Well, did you have anything to do with it?

A. I had something to do with it. I remember I revised part of it.

(Testimony of Lawrence Barnett)

Q. Well, is your revised part of the language before it was finally executed? A. Correct.

Q. Then it went into Mr. Cramer for execution?

A. Right.

Q. At that time he was an officer of the company?

A. Correct.

Q. And you were not an officer of the company?

A. That is right. [1126]

Q. Did you have any conversation with anybody in your company relative to the signing of this contract—or, rather, the execution of it, the drawing of it, or the fact it should be executed? Was it discussed; that is the point?

A. I think the only person that discussed it was Mr. Cramer, the man who signed it.

Q. Was it discussed with Mr. Bishop?

A. Correct; Mr. Bishop.

Q. At the time this was signed, Mr. Bishop was servicing accounts—do you use that term?

A. That is correct.

Q. —serving the Dailard account? A. Correct.

Q. Prior to that time who had worked the account there? A. I believe Lyle Thayer.

Q. Did you actively handle this account?

A. No; I have never serviced Mr. Dailard actively.

Q. Did you make trips on occasion down there to his operation? A. No; I haven't.

Q. Usually when he came into the office would he see you or some other man?

A. He saw Mr. Bishop.

Q. Did you approve the form of this agreement before it was signed? [1127] A. Yes.

(Testimony of Lawrence Barnett)

Q. At the time you gave that approval was there any intention on your part to prevent or restrict the competition and the trade in bands in San Diego? A. No.

Q. Was there any intent on your part to restrain the booking of bands in San Diego by the execution of this agreement or your approval of it? A. No.

Q. In 1944, in May, Defendants' Exhibit F was executed, according to the date upon the instrument. Do you remember that contract? That is the Dailard-M. C. A. contract, the formal contract. A. Yes, I do.

Q. Did you see it before it was signed?

A. Yes.

Q. Did you approve it? A. Yes.

Q. It was in effect—it was substituted and took the place of the letter agreement of November 4, 1941; is that correct? A. Correct.

Q. At the time this was executed did you know Mr. Finley; that is, I am speaking now of Defendants' Exhibit F; that is the May, 1944 contract? [1128]

A. No.

Q. Had you ever met him?

A. I had never met him.

Q. Was there any intention on your part in approving this contract—as it bears someone else's signature—was there any intention to restrict the business of booking bands or entertainment in San Diego? A. No.

Mr. Warne: If the court please, counsel—may I approach the bench?

The Court: Yes; both of you had better approach the bench.

(Testimony of Lawrence Barnett)

(Conference between counsel and the court in low tones as follows:)

Mr. Warne: In examining this witness, I heard, turning his face toward the jury, Mr. Christensen say audibly enough so that I could hear it clear back where I was: "If he answers this question 'yes' I will drop dead."

Mr. Christensen: I was talking to Mr. Finley.

Mr. Warne: I know you were, but it was in such a voice—

The Court: They can hear everything you say in here. You should not make any such remark, you know.

Mr. Christensen: I did not know it was that loud. This is the first and only time you have heard anything.

Mr. Warne: There was a remark by Mr. Finley yesterday [1129] that I overheard while the jury was still there. I did not say anything yesterday.

Mr. Christensen: I did not hear it.

Mr. Warne: I am not saying that you did.

The Court: You should have your conferences, gentlemen, either in a very low voice, or outside the courtroom. This plaster here is designed for the purpose of accelerating sound. It is a composition plaster that is made for that purpose. I can speak in this tone, for instance, and if there is anyone in the courtroom, it can be heard in that end of the courtroom. So, if you will refrain from those remarks?

Mr. Christensen: Mr. Warne, you of course know that that was just a kidding remark to Mr. Finley.

Mr. Warne: I understand that. I know you did not intend it.

(Testimony of Lawrence Barnett)

Mr. Christensen: Keep your voice down now, please.

The Court: You gentlemen ought to keep your own comments and your own feelings and interests to yourselves in this courtroom, all of you, and not give any manifestation of conduct that would be unbecoming, or that would be, perhaps, prejudicial to the jury.

Mr. Christensen: I think, if it was heard by you, it was unbecoming.

The Court: I did not hear it. [1130]

Mr. Christensen: Anything that could be heard by Mr. Warne, I concede it was unbecoming. I just was kidding him, you know, and I was a little too close to them.

(Further proceedings in open court:)

The Court: Proceed.

Mr. Warne: May we have the last question?

(Record read by the reporter.)

Q. Did you discuss with anyone of your company, Mr. Stein, particularly, and Mr. Bishop—Mr. Stein signed the agreement, I believe—did you discuss with them on that occasion, or with Mr. Cramer on a prior occasion, any matter of attempting to limit or restrict the booking of bands in San Diego or the San Diego territory? A. No.

Q. Was there ever any conversation between you, Mr. Stein, or Mr. Bishop at any time that, by these agreements or by any act or conduct, there should be any restriction or restraint of the business of booking bands in San Diego? A. No.

(Testimony of Lawrence Barnett)

Mr. Christensen: Just a moment. May I ask that that be stricken as hearsay?

The Court: Yes; that will go out. You will disregard that, ladies and gentlemen, that last answer.

Q. By Mr. Warne: Do you remember the first occasion that you met with Mr. Finley? A. Yes.

Q. Was that the time that Hal Howard and Mr. Finley came to your office? A. That is right.

Q. That has been testified to here. Just relate your recollection of what occurred on that occasion?

A. Mr. Howard brought Mr. Finley in, introduced him to me, and Mr. Finley told me that he was intending to take over Mission Beach ballroom, he thought he would get the Mission Beach ballroom due to the fact that he had some very good political connections with the town. He said he was [1134] interested in putting in name bands and wanted to know if we had any bands available. I explained to him at that time that we had— [1135]

Q. Well, you explained. You stated to him?

A. I stated to him that we had a contract with Wayne Dailard which gave him the first refusal of bands we represented, and I suggested that the town was not big enough to maintain two ballrooms competing with name bands; that I didn't think either ballroom would make any money; that I thought it would be better, as long as he wanted to go into the entertainment business, for him to go to a town like Oakland, where our ballroom operator that we had there had not been doing too well because he had not been active in the business.

Mr. Finley also stated he might open a ballroom or build a ballroom in Burbank, and I suggested that might

(Testimony of Lawrence Barnett)

be a good idea since that center of the valley was building up very rapidly. Mr. Finley told me he would think the matter over and would get back to see us.

Q. Did he say anything at that time about Casino Gardens? A. No.

Q. That subject wasn't discussed at all?

A. Right.

Q. Did you tell him on that occasion he could not have bands? A. I did not.

Q. When next did you see Mr. Finley? [1136]

A. I believe the next meeting I had with Mr. Finley was the Copper Room meeting that has been mentioned before.

Q. Was there a meeting before you went to the Copper Room?

A. There was a meeting in my office. Mr. Finley and McDonald came into my office, and we started talking, and Mr. Howard came in while we were talking, and we then went to lunch. Mr. Finley told me he had been awarded the contract at the Mission Beach Ballroom and wanted to know what bands we had available. I again explained that we had this first refusal contract with Mr. Dailard, and we would have to submit the bands first to Dailard, and any bands Mr. Dailard turned down we would be glad to offer him.

And then he asked me if he could go to the band leaders direct. I said that was perfectly all right, we could not stop any band leader from dealing direct, and we wouldn't stop any band leader from dealing direct.

(Testimony of Lawrence Barnett)

Q. Was there a question of any band leader's name?

A. I believe Mr. Finley told me he was very friendly with Freddie Martin, whom he knew, and I also believe he talked about talking to Harry Owens.

Q. Was Harry Owens in the territory at that time?

A. Yes.

Q. Was there anything said about the availability of bands in that conversation? [1137]

A. No. Mr. Finley didn't know exactly when he was going to open, or what his opening date would be.

Mr. Christensen: May that last statement, "Mr. Finley didn't know when he was going to open," and so forth, go out?

The Court: Yes, the way it is stated.

Q. By Mr. Warne: Is that what he said to you?

A. Yes.

The Court: Now it will stand.

Q. By Mr. Warne: Did he talk about wanting a band for his opening? A. Yes.

Q. What did you say?

A. I told him we would try to see if we could find something available for him.

Q. And you did?

A. No, we weren't able to make anything available.

Q. I see. Now, you went over to the Copper Room and had lunch. There has been something said about Jan Garber. Did Jan Garber go to lunch with you?

A. Jan Garber did not go to lunch with us, no.

Q. Did you see him that day?

A. I believe we passed Jan Garber going out.

Q. He was at another table, or some place?

A. I believe he was coming in with Mr. Thayer.

(Testimony of Lawrence Barnett)

Q. Was Mr. Thayer at your lunch? [1138]

A. No.

Q. Who was present at this lunch?

A. Hal Howard, Mr. Billy McDonald, and myself.

Q. And Finley?

A. And Finley. Pardon me.

Q. I take it there was a lot of conversation. You haven't related all of the conversation?

A. No, we talked about a lot of things. I can't remember about everything we talked about. I think we talked a little about the Trianon, and a few bands were mentioned that might be available for that ballroom.

Q. Now, then, I believe the next episode was the Paul Martin booking. Do you remember the Paul Martin booking into the Trianon? A. I do.

Q. What part did you have to play in that?

A. As I remember, Mr. Howard brought Mr. Finley into my office and he said he had made a booking for Paul Martin at the Trianon Ballroom, and had discussed it with Paul Martin and confirmed the engagement. I said, "Did you definitely confirm it, and Paul Martin definitely confirm it?" He said, "yes."

I told him he had better tear off the M. C. A. names and the pictures and the publicity, and put the contract on the union form of contract. [1139]

Q. Was Mr. Finley there at the time?

A. Yes.

Q. Did Mr. Howard at that time ask you why this should be done, or did Mr. Finley ask you why?

A. No.

Q. And you didn't tell them why?

A. I didn't tell them why.

(Testimony of Lawrence Barnett)

Q. Now, do you remember about this time having some conversations—well, this has been suggested: Why did you do that? A. Why did I do it?

Q. Yes.

A. Well, Hal Howard was a new man in our office. I knew he had already made the commitment, and I didn't want to embarrass ourselves with Wayne Dailard. I thought if we kept M. C. A.'s name out of it, we wouldn't be embarrassed.

Q. That is, you knew Martin had not been submitted to Dailard? A. That's right.

Q. About this time, or along this time, did you have any conversations with Mr. Ross of our firm, N. Joseph Ross? A. Yes, I did, with Mr. Ross.

Q. What conversation did you have with him relative to Mr. Finley's request for the booking of bands at Mission Beach? [1140]

A. Mr. Ross, I believe, came out to see me and also sent me several memos on the matter, advising me that Mr. Finley had been in or his attorney had talked to him, and we should try to get some bands available for Mr. Finley. I told Mr. Ross at the present time we didn't have any bands—

Mr. Christensen: Just a moment. May I interrupt? May I interpose an objection here, that it is hearsay?

The Court: No, I think the witness is charged as a co-conspirator in the case and has a right to disclose to the jury what he did.

Bear in mind, ladies and gentlemen, that in this case there is one corporate defendant, and then there are other personal defendants as well, and they are all charged

(Testimony of Lawrence Barnett)

with being members of the conspiracy with the witness Dailard. The evidence may be relevant as to one and not as to others, or it may be relative as to more than one and not as to all. But this witness has a right to present his situation to the jury and have it considered. Overruled.

Q. By Mr. Warne: Now, I believe you were interrupted.

A. I was interrupted, and I don't know where I was.

Q. Well, let me ask a new question and pick it up more quickly. You were relating the conversation with Mr. Ross, or conversations. Did you have more than one conversation?

A. I believe I had several conversations with Mr. Ross. [1141]

Q. Was the contract, or either of the contracts before you on any one of those occasions? I am speaking now of Defendants' Exhibits E or F.

A. I don't believe so.

Q. All right. Now, relate the conversation.

A. Mr. Ross asked me if we couldn't find some bands for Mr. Finley and, in fact, I believe at one time he even sent me a note of dates Mr. Finley had available for booking, and asked me if there weren't some bands that could be made available to go to San Diego to play for Mr. Finley. I told Mr. Ross that there was a shortage of bands at the present time, that there weren't enough to go around, and we were playing them at Pacific Square sometimes two and three times.

Q. Do you recall that you submitted or had this Defendants' Exhibit F sent to his office, to Mr. Ross, for perusal?

A. I don't remember.

(Testimony of Lawrence Barnett)

Q. Do you recall Mr. Ross talking to you about this subject-matter, namely, that there had been a suggestion by Mr. Finley's attorney that there would be a likelihood of an anti-trust suit if you didn't give him bands?

A. Yes.

Q. And did Mr. Ross consult with you with reference to that claim? A. That's right.

Q. What was the conversation in that regard? [1142]

Mr. Christensen: Again, your Honor, I may be all wrong, but I want to suggest that that is hearsay, and I object on that ground.

The Court: It is the same matter. It isn't hearsay so far as the defendant Barnett is concerned. It is direct, positive testimony with respect to his activities.

As I stated before, ladies and gentlemen, and as I restate and reinstruct you at this time, this may be material and relevant as to one of the defendants and not as to others, and it may be material as to all of the defendants. This matter will be for you, under the proper instructions, later on. But you must bear in mind throughout the case that the case is not directed solely against one defendant. It is directed against one corporate defendant and other personal defendants who are named in the complaint, one of which is the witness on the stand. Overruled.

Mr. Warne: Now, may I have that question again, please?

(The question was read.)

Q. By Mr. Warne: That is with reference to the threat of an anti-trust suit.

A. Mr. Ross told me they were threatening to sue if we weren't able to sell them bands, and he asked us

(Testimony of Lawrence Barnett)

to please try to find some bands, he didn't want to get in any law suits, if possible.

Q. Now subsequent to that did you give any instructions [1143] to anybody?

A. Yes, I sent the list to Mr. Hal Howard and to Mr. Bishop, and asked them if they couldn't find some bands available for Mr. Finley.

Q. Now, did you communicate to Mr. Bishop the fact that Mr. Ross had been over to see you? A. Yes.

Q. And also, to Mr. Howard? A. Yes.

Q. Have you had any conversations with Mr. Finley since the 21st of March, 1945? That is the date the complaint was filed here?

A. Yes, I have had several conversations with Mr. Finley.

Q. With reference to what did you have conversations with him?

A. With reference to bands at Casino Gardens, and with reference to—he was looking for a house to rent, and I can't remember all the matters; with reference also to a benefit he was running down at Casino Gardens for the Examiner people, and asked me to help him out and try to get him some talent.

Q. And did you?

A. I helped him and got him Carmen Cavallero to come out from Ciro's and appear there. [1144]

Q. And when you spoke of Casino Gardens, was that with reference to booking bands into Casino Gardens?

A. Yes.

Q. —at the time he was a part of the management at Casino Gardens? A. Yes.

(Testimony of Lawrence Barnett)

Q. Now, in any of those conversations did he ever request of you or discuss with you the booking of any bands at Mission Beach? A. No, he did not.

Q. Ever raise the question at all?

A. No. I believe the only time that the question was ever mentioned was at the meeting I had with him after the Tommy Dorsey opening. He told me he had bought Casino Gardens, and wanted to be friendly with us at Casino Gardens, and said, "Even if we are having trouble at the other—at the Mission Beach Ballroom," he said, "I still want to buy bands from you at Casino Gardens."

Q. Now, there has been something mentioned here about the King Sisters. The King Sisters are an act, an attraction, and known as that; is that correct.

A. Correct.

Q. There has been introduced in evidence here this yellow memorandum, the inter-office communication, marked "Ken." Do you recognize that as being Mr. Later's signature? [1145] A. That is right.

Q. And this came to you direct? A. Right.

Q. And that is the method you have in the business there? A. That is the method.

Q. Then what did you do with it?

A. I passed it on to Mr. Bishop and asked him to check on it and let Mr. Later know.

Q. Had there been any discussion prior to that time in your office with reference to Mr. Dailard wanting this attraction at Pacific Square? A. No.

(Testimony of Lawrence Barnett)

Q. Then after you passed this on to Mr. Bishop, what further was done about it in so far as you were concerned?

A. Well, there was nothing so far as I am concerned, that was done about it. I mean the booking was made, but I had nothing to do with it.

Q. I call your attention to the fact that January 11th is the date of this memorandum. Do you remember exactly when you had it in your hands?

A. I assume it must have been on the same day, or, in any event, on the next, because we try to pass the inter-office memos around on the same day, if possible.

Q. It is the custom in the trade or in your office to pass [1146] those on from one to another rather than have a conversation? A. That's right.

Q. When you handed that to Bishop, how much later would that be?

A. I imagine the same day or the next day.

Q. You say you imagine. You mean in the ordinary course that is the way it would go? A. Correct.

Q. Now, with reference to Mr. Later, do you recall him discussing with you the booking of the King Sisters for Mr. Finley at Mission Beach?

A. I believe Mr. Later mentioned that he was submitting the King Sisters to Mr. Finley.

Q. When an attraction like this is in the office or is open for booking, what is the ordinary custom with reference to salesmen booking the account?

A. The policy is when an attraction or a band is available, we submit them to every customer that can possibly use them.

(Testimony of Lawrence Barnett)

Q. And what date is ordinarily selected as being the—

A. The soonest date you can possibly get, because you don't want to leave any open time for the attraction to be out of work or lose any money for them.

Q. That is the ordinary method in the operation of your office; is that right? [1147] A. Yes.

Q. In so far as you know, was it deviated from in this instance? A. No, sir.

Q. Did you direct either Mr. Bishop or Mr. Later to deviate from that method? A. No.

Q. Was there any direction on your part for the booking of the King Sisters with Mr. Dailard at Pacific Square rather than at Mission Beach? A. No.

Q. Who handled the booking of the King Sisters at Pacific Square? A. Mr. Bishop.

Q. Did you have anything to do with completing it, on your part at all? A. Not at all.

Q. Was that also in the ordinary course?

A. That is true.

Q. Did Mr. Later, prior to the time that he went to New York, and I believe you said that was the 19th of January—did he tell you that he had booked the King Sisters into Mission Beach, had made arrangements for it, and that you should follow through?

A. No. [1148]

The Court: I think we will suspend now until 2:00 o'clock. Ladies and gentlemen, remember the admonition and keep its terms inviolate. I want to confer with counsel for a moment off the record.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m. of the same day.) [1149]

Los Angeles, California, Friday, February 8, 1946.
2:00 p. m.

The Court: All present. The case on trial.

Mr. Doherty: If the court please, should we take up at this time the matter of the books that were requested to be brought in with reference to Mr. Dailard? That is the reason I am bringing it up at this time, rather than giving it to plaintiff's counsel at the last moment. When we recall Mr. Dailard, I would rather he have these records in advance so that he could have his accountant go over them.

Mr. Christensen: I would appreciate that, Mr. Doherty. Thank you.

The Court: They are produced. The record will so show, and counsel for defendants is delivering them to counsel for plaintiff for further inspection and consideration. They should be, of course, sequestered so that we will know who is looking at them and hold those people responsible who are doing that.

What are your desires in the matter, gentlemen? They are your books.

Mr. Doherty: They are Mr. Dailard's original records, but I will entrust them with Mr. Christensen and anybody that he desires to give them to for examination.

The Court: So long as we know that counsel, Mr. Jaffe or Mr. Christensen or his associate, see to it that they [1150] remain within their personal supervision and surveillance at all times.

Mr. Christensen: Yes, your Honor. May that include Mr. Karp?

The Court: Yes.

Mr. Christensen: Inasmuch as I may want him to go out in the clerk's office.

The Court: He was the one I mentioned as an associate. You may call him Mr. Karp now.

Mr. Christensen: Thank you, your Honor.

Mr. Doherty: Will it enable counsel for the plaintiff to be in a better position to examine the books if we put Mr. Dailard on and give the figures that Mr. Dailard is going to call attention to out of the books, so that that would give them a better opportunity to examine the books for those particular items?

I have given counsel a copy of the profit and loss statement for the Beach Amusement Enterprises from January 1, 1944 to December 31, 1944, upon which Mr. Dailard will be examined.

The Court: I think it would be better, probably, if we concluded with Mr. Barnett. The mind of the jury, as well as of the court, as far as that is concerned, follows these things a little more sequentially.

Mr. Doherty: Yes, your Honor. [1151]

The Court: And I am inclined to think if we get from a narrative into a financial statement, that we will not be able to follow the testimony as closely. So I think Mr. Barnett had better resume the stand.

LAWRENCE BARNETT,

called as a witness by and on behalf of the defendants.
having been previously duly sworn, resumed the stand
and testified further as follows:

Direct Examination (Resumed)

By Mr. Warne:

Mr. Warne: May I have the last question and answer,
please?

(Record read by the reporter.)

Q. Mr. Barnett—I am showing counsel a document—
by the way, so that I may follow the same line, when did
Mr. Later leave your company, the employ of your com-
pany?

A. I believe it was around the first or second week
in February. I am not positive of that. I could look up
the record.

Q. Had there been any, shall we call it, disagreement
of any kind between you or your company and Mr. Later
at or shortly before he left the employ of the company?

A. Yes.

Q. I show you a carbon copy of the memorandum
dated February 2, 1945 and ask you if you ever saw
the original of [1152] that? A. Yes.

Q. You received that from whom?

A. Mr. Joe Ross.

Q. Your attorney? A. Right.

Q. Attorney for the company? A. Right.

Mr. Warne: If the court please, I will offer the mem-
orandum of February 2, 1945.

Mr. Christensen: Your Honor, in addition to the rule
of hearsay, may I add at this time or suggest to the
court that it is self-serving?

(Testimony of Lawrence Barnett)

The Court: May I see it? [1153]

Mr. Warne: May I ask one foundation question first?

Q. By Mr. Warne: When did you receive the original of that with reference to the date it bears?

A. I think it says February 2nd.

Q. Was it on or about that date?

A. On or about that date.

The Court: I think this is inadmissible. Objection sustained. Mark it for identification.

Mr. Warne: If you please, will you mark it as the Defendants' Exhibit next in order?

The Clerk: Defendants' Exhibit N, for identification.

(The document referred to was marked as Defendants' Exhibit N, for identification.)

Q. By Mr. Warne: I show you a memorandum dated February 20, 1945, and ask you if you saw the original of that memorandum? A. Yes.

Q. When, with reference to the date it bears, approximately?

A. On or about February 20th, 1945.

Mr. Warne: If the court please, I offer in evidence the memorandum referred to.

Mr. Christensen: The same objection, your Honor, without restating it, if I may.

The Court: Was that an inter-office memorandum of the [1154] defendant corporation?

Mr. Warne: No, it is not, your Honor.

The Court: I see. It is the same as the other?

Mr. Warne: This foundation question, please:

(Testimony of Lawrence Barnett)

Q. From whom did you receive it?

A. Mr. Joe Ross, our attorney.

Q. That is attorney for the company?

A. Right.

The Court: May I see the other one, Mr. Figg?

(The document referred to was handed to the court.)

The Court: Objection sustained.

Mr. Warne: May it be marked, for identification, as the defendants' next in order?

The Court: Yes.

The Clerk: Defendants' Exhibit O, for identification.

(The document referred to was marked as Defendants' Exhibit O, for identification.)

Q. By Mr. Warne: Mr. Barnett, in the various dealings that you had with Mr. Finley, or with any person employed under your supervision relative to him securing bands or orchestras to play at the Mission Beach Ballroom, were any of such acts done for the purpose or with the intent of restricting and preventing the performance of orchestras or the booking of the performance of orchestras in the Mission Beach Ballroom? [1155]

A. No.

Q. Did you ever have any discussions or conversations with Mr. Bishop, or with Mr. Stein, or the three of you, in which there was discussed any course of conduct which should be followed with the intent or for the purpose of restricting and preventing the booking of orchestras at the Mission Beach Ballroom in San Diego.

A. No.

(Testimony of Lawrence Barnett)

Q. Now, I believe you said that you had seen Mr. Finley from time to time, particularly after he went into the management of Casino Gardens; is that correct?

A. Correct.

Q. If Mr. Finley had requested of you that bookings be submitted, that is to say, the names of orchestras or band leaders for the purpose of booking bands at the Mission Beach Ballroom, would you have considered his request?

Mr. Christensen: To which we object, first, on the ground that it calls for speculation, and, second, it is self-serving.

The Court: I think that is conjectural. Sustained. Proceed.

Q. By Mr. Warne: Do you know Birnie Cohen?

A. Yes.

Q. When did you see him next before the time you saw him as a witness in the court room? [1156]

A. The Friday before the trial started.

Q. Where?

A. He came to our office at 9200 Wilshire Boulevard.

Q. And did he talk to you? A. Yes.

Q. Was that by appointment?

A. No, he just dropped in to see me.

Q. You have known him for a number of years?

A. About ten years.

Q. And done business with him over a part of that period? A. Yes.

Q. Sold him bands when he was running the Casino Gardens? A. Right.

Q. At that time was there any conversation relative to Mr. Finley, on that Friday morning? A. Yes.

(Testimony of Lawrence Barnett)

Q. Relate it, please.

A. Mr. Cohen came in to see me and told me he had been subpoenaed as a witness for Mr. Finley, that he was very happy that he could appear at this trial, because he said he would really like to tell what he felt about Mr. Finley. He said he felt that Mr. Finley was not a good manager, that he was doing all the work, that Finley was taking all the glory, [1157] and he felt Finley was a big promoter, and in the exact words he said, he said he was a phony, and he said he was very happy to go down to court to tell it.

Q. By the way, one other question I didn't go into, and should have. Did you ever have any discussion with Mr. Michaud, who has been described here as Tommy Dorsey's personal manager or manager of his orchestra, relative to his playing at Mission Beach? A. Yes.

Q. Where?

A. At the opening at the Plaza Hotel in New York City.

Q. Who was present?

A. Mr. Bishop, Mr. Michaud and myself.

Q. Relate the discussion, please.

Mr. Christensen: To which we object as hearsay.

The Court: Sustained.

Q. By Mr. Warne: Did you ever have any conversation with any other band leader who is represented by Music Corporation of America, relative to this, that is, that band leader's playing in Mission Beach?

A. Yes.

Q. With whom? A. Charles Barnet.

(Testimony of Lawrence Barnett)

Q. Did Charles Barnet play at Mission Beach?

A. Yes. [1158]

Q. Where did that conversation occur?

A. The conversation took place in New York City.

Q. Will you relate it, please?

Mr. Christensen: To which we object as calling for hearsay.

The Court: Sustained.

Q. By Mr. Warne: Subsequent to that conversation did Mr. Barnet play Mission Beach? A. Yes.

Q. Did you at any time ever state to Mr. Barnet that he should not play Mission Beach? A. No.

Q. Did you ever at any time say to Mr. Michaud that Tommy Dorsey should not play at Mission Beach?

A. No.

Mr. Warne: Cross-examine.

Cross Examination

By Mr. Christensen:

Q. Had you asked Birnie Cohen to be a witness for you or for M. C. A. at this trial? A. No.

Q. You discussed that, though, didn't you?

A. No.

Q. Did this conversation that you have told us took place between you and Birnie Cohen take place in the presence [1159] of any other person? A. No.

Q. He came into your office and told you that?

A. Yes.

Q. No person except you and Birnie Cohen were present? A. That's right.

No. 11483

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LARRY FINLEY and MIRIAM FINLEY,

Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellees,

and

MUSIC CORPORATION OF AMERICA, a corporation,
H. E. BISHOP and LAWRENCE BARNETT,

Appellants,

vs.

LARRY FINLEY and MIRIAM FINLEY,

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TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME IV

(Pages 993 to 1328, Inclusive)

Upon Appeals from the District Court of the United States
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(Testimony of Lawrence Barnett)

Q. You are acquainted with the five affiliate corporations of Music Corporation of America, are you not?

A. I am not acquainted with them. I know their names.

Q. Well, they all operate as one unit, one entity, do they not? A. I wouldn't know that.

Q. Well, you have told us that you are an officer of one of the affiliate corporations; that is right, isn't it?

A. That's right.

Q. And that is the California Movie Corporation?

A. I don't know if it is California Movie Corporation. I think it is Movie Corporation. I am not sure of the title.

Q. As a matter of fact, you disregard the corporate entity, do you not, in the transaction of your business?

A. I don't understand your question.

Q. Let me withdraw the question and ask you: What, if any, duties do you perform for the California Movie Corporation?

A. I take care of hiring janitors for the building and [1160] seeing the building is kept up.

Q. What building is that, sir?

A. 9370 Burton Way.

Q. That is Music Corporation of America Building, isn't it?

A. The Music Corporation of America offices are there.

Q. Is there any office of the California Movie Corporation there? A. I wouldn't know.

Q. Well, where are the offices of the California Movie Corporation? A. I don't know.

(Testimony of Lawrence Barnett)

Q. Yet you are the secretary of the corporation, you tell us? A. That's right.

Q. As secretary your duties are hiring and firing of janitors; is that what you just told me?

A. That's correct.

Q. Do you have an assistant secretary, Mr. Barnett?

A. No.

Q. You named this morning, I believe, four booking agencies with which you are acquainted. You said, of course, Music Corporation of America, General Amusement Corporation, Frederick Brothers Agency, William Morris Agency, and then you said Moe Gail, I believe, as the last one. Now, Moe [1161] Gail, where is their place of business? A. New York City.

Q. That is just a new agency, isn't it? A. No.

Q. Isn't that an agency which handles only colored attractions?

A. I think they have some white attractions. I am not sure.

Q. Can you think of one white attraction that they have? If you can, will you please tell me now? [1162]

A. They have some singers' acts. I don't know the exact names of them.

Q. Tell me one white orchestra or band, Mr. Barnett. So that you will understand I don't know very much about music or musical entertainment and that, if I use the words "band and orchestra", I am using them synonymously, and correct me if the occasion should require. Will you do that? A. Right.

Q. Now then, does the Moe Gail represent one white orchestra? A. I don't know.

(Testimony of Lawrence Barnett)

Q. You said that you split commissions—with other agencies? A. Right.

Q. When did you split commission with the William Morris Agency, sir?

A. The last commission we sent them—this is our band department I am talking about—was the Artie Shaw in, I believe, October, November or December—October or November of this year.

Q. Well, Artie Shaw was then an M. C. A. band, wasn't it?

A. Artie Shaw is not a M. C. A. band. He has never signed a contract with M. C. A.

Q. You people are representing him, aren't you? [1163] A. We are booking him; yes.

Q. And he is under contract with no other agency that you know of?

A. Not that I know of, no other agency.

Q. And certainly he is not under contract to the William Morris Agency that you know, don't you?

A. I don't know the exact setup of that. He has to pay them certain monies until he can get his release from them.

Q. Is there trouble getting a release if an orchestra wants to get released from one of your agencies?

A. I imagine the agency is not anxious to release the orchestra.

Q. That is the only one you can tell me about there, and that is this Artie Shaw matter with William Morris Agency? A. No.

Q. Where did you book him into first?

A. You asked me another question. Do you want me to finish that?

(Testimony of Lawrence Barnett)

Q. I will come back to it in a minute. If you will, I would just like to clear up this Artie Shaw matter, and then I will come back to that. Where did you book him first that you had to split a commission with the William Morris Agency?

A. We booked him on a tour of one-nighters up around [1164] California and the Meadow Brook here in Los Angeles.

Q. That is the only occasion you can think of with reference to the William Morris Agency; is that true or untrue? A. No; it is untrue.

Q. Tell me another occasion, sir?

A. Well, Hal McIntyre.

Q. And when was that, sir?

A. I can't tell you exactly the dates. I think it was in '43. I am not positive on that.

Q. Some time in the year 1943. A. I believe.

Q. Would it be spring, summer, fall or winter? Could you help us that much?

A. I think it was in the summer time, spring or summer.

Q. What booking was that?

A. We booked the band on a tour of one-nighters.

Q. Who was representing Hal McIntyre at that time?

A. William Morris.

Q. Now, have you exhausted your list as far as you can now recall, sir? A. No.

Q. Tell me. A. Al Donahue.

Q. When was that, sir? [1165]

A. I believe that was in the same year, '43.

(Testimony of Lawrence Barnett)

Q. About the same time, or earlier or later?

A. I don't know the exact dates on that. We have records which I could produce and show you.

Q. By the way, do you recall whether that was a one-night engagement, too?

A. It was a one-night tour, and I believe we put him in the Aragon ballroom, if I am not mistaken. I am not sure of that.

Q. You mean the Aragon ballroom down at Ocean Park? A. Right.

Q. That is an account which you service is it?

A. No; Mr. Bishop services that account.

Q. By the way, tell me what are the duties of a salesman in addition to selling bands?

A. Well, it is a pretty broad question. In addition to selling bands, all of his duties are comprised in selling bands, counselling with the band and aiding them.

Q. I am talking, of course, of salesmen employed by the Music Corporation of America, and one of the 11 salesmen that work under you. You understand that question, don't you? A. Yes.

Q. I mean, I don't want to take salesmen generally, just that. In addition to selling bands what are their other [1166] duties?

A. They counsel and aid and advise the orchestra leaders.

Q. They have no other duties than that, is that true?

A. That is about the whole of it, I believe. Some of them might have some inter-office functions.

Q. By that, you mean?

A. Well, maybe takes care of hiring of the girls or something like that.

(Testimony of Lawrence Barnett)

Q. No; I was not thinking of that one. So, then, his duties are, first—and I think this would be first, wouldn't it—to sell the band; that is his primary duty?

A. Selling the bands, that takes in a very large scope.

Q. I will give you a chance on that. You sell the bands; and then, too, advise and counsel and aid the bands in their problems, is that it?

A. That is true.

Q. That, then, is the duties of a salesman as such, is that true? A. Yes; that is true.

Q. Generally speaking, you are acquainted with the booking of the licensed booking agents, I take it; is that right, sir? A. Right.

Q. So you know Warner Austin is a licensed agent, don't [1167] you?

A. I didn't know it until I heard it and looked it up in the book, the union book, the latest.

Q. So you found that he is? A. Yes, sir.

Q. In addition to the other things which you perform, that you have told us about, aiding and counselling and advising the bands, you do other things to promote the general reputation and popularity of your bands, do you not? A. That is right.

Q. For example, you have this program, the Coca Cola show, that you put on; that is right, is it?

A. Yes.

Q. And that is in order that they may have radio publicity for the band? A. That is true.

Q. And wherever possible, you try to get them radio time; is that the correct way to say it, radio time?

A. Yes; that is correct.

(Testimony of Lawrence Barnett)

Q. Broadcasts, so that it has as great a coverage as possible for them? A. Correct.

Q. I am using the words correctly, sir? You help me, won't you?

A. You are doing very well. [1163]

Q. If you can get a coast-to-coast broadcast for them, why, that is what you are looking for, isn't it?

A. That is correct.

Q. And that is also true with your advertising matter; you send that out so that the ballroom operators will give the greatest publicity possible for the band?

A. That is right.

Q. So it will be published in the newspapers. On this Coca Cola program you supply them without request from anyone; or, in other words, you designate which band shall play on that at the particular time, don't you?

A. No.

Q. Well, what does happen then?

A. We submit a list of bands to the Coca Cola people and they decide which bands they want.

Q. Oh. You knew, of course, that Mr. Bishop was going down to San Diego to appear before the City Council, didn't you? A. Yes.

Q. He discussed that with you? A. Yes.

Q. And you recall, do you not, that Mr. Finley talked with you about the King Sisters?

A. No; I don't remember.

Q. Well, now, you remember the fact of him talking to [1169] you about the King Sisters, don't you?

A. No.

(Testimony of Lawrence Barnett)

Q. No memory on it at all?

A. No. We might have mentioned the King Sisters' name at some time; but I don't remember the exact conversation at this time.

Q. Do you remember something about he being offered a booking and the King Sisters was available on the 3rd or 4th of February?

A. Yes; I remember that.

Q. You remember your discussion with Mr. Finley of that matter, don't you? A. No.

Q. Did you discuss that with any other person?

A. I probably discussed it with Mr. Later and Mr. Bishop.

Q. Do you recall a conversation with Mr. Ken Later in which Mr. Ken Later told you that he had made a confirmed booking, a confirmed booking of the King Sisters with Larry Finley? A. No.

Q. You have no memory of that now? A. No.

Q. Did Mr. Later tell you that? A. No.

Q. Did you tell Mr. Bishop to get on the telephone and [1170] submit the King Sisters to Dailard?

A. I turned over Mr. Bishop's memo to—pardon me. I turned over Mr. Ken Later's memo to Mr. Bishop, and I imagine he would have gotten on the telephone.

Q. Did you tell him to do that?

A. I didn't tell him to do that. I said, "Here's a submission. Go and submit it to Wayne Dailard."

Q. Tell me when was the first time that you talked with Mr. Finley, sir?

A. I believe it was the latter part of September or the first of October.

(Testimony of Lawrence Barnett)

Q. And where was that, sir?

A. In our office. At that time our band department was at 9370 Burton Way.

Q. And who else was present, sir?

A. Hal Howard, Mr. Finley and myself.

Q. Was there a conversation on that occasion?

A. Yes.

Q. What was said?

A. I believe I told most of that this morning to Mr. Warne. I told you that Mr. Finley came in, Mr. Hal Howard introduced him to me. He said he was thinking of taking over Mission Beach Ballroom, he was going to bid on it, and he had very fine political connections there and he thought he would get the ballroom. [1171]

I told him that we had a contract with Wayne Dailard which gave Dailard first refusal of all bands. And I talked to him about going to Oakland; that I thought he could make more money in Oakland; and also, we talked about the Burbank situation.

Q. You told him you would furnish him bands if he opened in Oakland, didn't you? A. Yes.

Q. You told him that if he put up a ballroom in Burbank you would furnish him with bands, too, didn't you? A. Right.

Q. But that if he opened up down there, or if he got the bid down there at Mission Beach, that you could not give him any? A. I didn't say that.

Q. You couldn't give him any unless Dailard turned them down? A. That is correct.

(Testimony of Lawrence Barnett)

Q. And you never knew Dailard to turn down a band, did you?

A. Well, I wouldn't know. He might have turned some bands down. I don't know. Mr. Bishop handled the account. I didn't submit them.

Q. You never even heard of one, though, did you?

A. I don't know any offhand, no. [1172]

Q. You know that Music Corporation of America furnished him bands at Casino Gardens, too, don't you?

A. Furnished who?

Q. While Mr. Finley was at the Casino Gardens?

A. Yes; we sold Mr. Finley bands right at the Casino Gardens.

Q. Now then, when was the next time you saw Mr. Finley?

A. I believe the next time I saw him was the Copper Room lunch.

Q. Well, didn't you see him in the office before you went over there?

A. I saw him for a few minutes, yes, in the office, and we talked a little.

Q. Who else was present on that occasion?

A. Billy McDonald, Larry Finley, Hal Howard came in and out on the conversation, and myself.

Q. All right. Tell me what was said then?

A. We talked to Mr. Finley. He had already obtained the lease for Mission Beach ballroom. He talked about getting bands. I again told him about our contract with Mr. Dailard. And I believe we talked a little bit about the Trianon ballroom and talked about a couple of bands for that. We talked about going to the bands direct, which I said was all right with us.

(Testimony of Lawrence Barnett)

Q. When he wanted to go and talk with Jan Garber why [1173] did you tell him not to?

A. I didn't tell him not to.

Q. What did you say to him?

A. I don't remember that even being discussed.

Q. You have forgotten that? A. No.

Q. You furnished Mr. Finley bands, have you, for use down there at the Trianon ballroom?

A. I believe we furnished one band, Paul Martin.

Q. Can't you think of any others?

A. None that I know of.

Q. Have you now told us all of the conversation which occurred over in your office—the word “over” should not be in there—in your office prior to going to the Copper Room?

A. I don't know which transpired in the office and which transpired at the Copper Room.

Q. Oh, by the way, this may possibly help you, or at least it will help me. In your office was there a conversation there concerning a band for his opening at Mission Beach?

A. I believe I testified that Mr. Finley did not know when his opening would be when he talked to us. He wasn't sure; they were decorating the ballroom, painting the ballroom, and he had a lot of things to do to the ballroom. He [1174] didn't know what date it would open.

Q. Can you tell me the date of this conversation with you at your office, sir?

A. I think it was the latter part of December or the first of January. I don't know the exact date.

(Testimony of Lawrence Barnett)

Q. Now then, what else was said, if anything, before leaving your office, sir?

A. I can't remember what was said before I left the office. I mean it was a conversation that took place in both spots.

Q. You have given us all of the conversation that took place on both occasions, the occasion in your office and while you were at the Copper Room, is that right?

A. I have given you all the conversation I can remember. There probably was more conversation.

Q. Did he come back to your office after the lunch?

A. I believe he did. I am not sure of that.

Q. Can you recall anything that was said on that occasion, sir?

A. I don't think he went into my office after that luncheon. I believe he went down to see Hal Howard. I am not sure on that.

Q. How many times have you talked with Mr. Finley?

A. That is pretty hard to say. We have had telephone conversations. I have seen him at Casino Gardens. He has [1175] been in my office.

Q. All right; let us take—I can see your point that it would be difficult. Let us take, now then, in order, the next time you saw him or talked with Mr. Finley after the occasion which, so we will understand each other, we will call the Copper Kettle conversation which you have just told us about. The next one, sir?

A. The next talk that I remember, I think is the time Mr. Finley came into my office after Tommy Dorsey's opening at Casino Gardens.

(Testimony of Lawrence Barnett)

Q. And could you help us by fixing that date, sir?

A. I believe Dorsey opened approximately the end of May.

Q. And then it would be the early part of June?

A. I couldn't say. I mean it was either the latter part of May or the first part of June, or whether he came in the next day after I was out there—I don't remember the exact date.

Q. Did you see Mr. Finley when you were out at the Casino Gardens? A. Yes; I did.

Q. That would be the next time that you saw him?

A. No. He didn't talk to me out there.

Q. Oh, all right. Then, a day or so later he came into your office, is that true? [1176]

A. Mr. Howard brought him into my office. They had had a telephone conversation about coming in.

Q. Just you and Mr. Howard and Mr. Finley present, sir? A. Right.

Q. What was said then?

A. Mr. Finley told me that he had bought into the Casino Gardens and he wanted us to know that he wanted to do business with us down there, regardless of the situation in San Diego; it had no bearing on the Casino Gardens setup; he would be glad to do business with us. We should submit all the bands to him; that he was going to do the buying.

Q. Did you say something in reply to that?

A. Oh, yes; I submitted bands to him. I believe he talked about a few bands that day.

(Testimony of Lawrence Barnett)

Q. Do you recall what bands you submitted to him then?

A. No; I don't remember the exact names of the bands. We probably went over our list and he probably said he would like to have so and so. [1177]

Q. You had a list of bands which you produced and which you and Mr. Finley discussed?

A. That's right.

Q. That is the situation, is it? A. Right.

Q. And from that list of bands, why, he selected some of them that he wanted? A. That is possible.

Q. Now, is that your best memory?

A. That is my best memory. We talked about many bands. All of the operators that come into the office want the top bands and say they don't want the others.

Q. That is a natural thing for a ballroom operator, to want the best bands, isn't it? A. Yes, sir.

Q. Without it he is going to be a second-rater, isn't he? A. Not necessarily.

Q. He won't make as much money, will he?

A. That is not true, either.

Q. Still the fact is they want the—

A. Certain promoters won't take big bands, they don't want them.

Q. Now, the Palladium always turns down your best bands, do they? [1178] A. No, they don't.

Q. They play nothing but your top bands?

A. That is a question—I mean it is a hard question. You say "top bands." You have a question as to which is a top band and which is a medium band.

Q. Well, you know, you represent them all?

(Testimony of Lawrence Barnett)

Mr. Warne: Just a moment. I object to the question. It is a voluntary statement of counsel and wholly improper.

The Court: That is right.

Mr. Christensen: I don't mean it in that way.

Q. By Mr. Christensen: I mean, all of those you represent?

The Court: If you want to testify, you can take the stand, and then you can be cross-examined by counsel.

You will disregard that, ladies and gentlemen. That was not evidence, and it was an improper observation by counsel and he should not have made it.

Q. By Mr. Christensen: I mean, of those you do represent, Mr. Barnett, and I don't want you, particularly here, to differentiate between one and the other,—of those you do represent, the ballroom operators feel that some are better than the others, don't they?

A. Some do. There is great discrepancy. Some bands at one place will do better business than at another, and other bands will do good business there. Everybody works [1179] for his own.

Q. Well, of those you represent, you have an opinion as to which is a best band, which is a good band, and some which are medium; is that true or not?

A. No, I wouldn't say it in that way.

Q. You tell me how you would say it.

A. Well, I like some bands better than other bands. I feel some bands will do better than other bands. That is my own opinion. Sometimes I am wrong; a lot of times.

(Testimony of Lawrence Barnett)

Q. Now, have you now told me all of the conversation which occurred on that occasion, sir?

A. I don't know if it was all the conversation. It was all the conversation I can remember at the present moment.

Q. Do you recall that on that occasion—the occasion now when Mr. Howard brought him in and talked with you—do you recall that Mr. Finley seemed to be peeved because you had gone down and hadn't spoken to him?

A. Mr. Finley never said a word to me. He said it to Hal Howard. He came in with a big smile on his face.

Q. Well, did you talk to Mr. Finley and tell him you hadn't intended to—

A. I told him I thought he was high-hatting me. I walked through the ballroom, and he wouldn't even look at me.

Q. I see. Now, have you given us all the conversation?

A. I told you I can't remember all the conversation. [1180] That's all that I remember at the present moment.

Q. Now, when was your next conversation?

A. Oh, I can't remember. Maybe in a day, a week. I can't remember exactly what the next conversation was. I think probably the next one was when he asked to get a band for the Examiner benefit. I am not sure. There might have been a conversation in between.

(Testimony of Lawrence Barnett)

Q. As I remember that conversation, was that just a few days after this conversation that you have just related to us?

A. I don't remember whether it was a few days or a week. I could look it up, probably, and see when the Examiner benefit was.

Q. No, but could we say a short time thereafter?

A. It could be possible, yes.

Q. That, as I understand, was a—he was putting on a benefit for the Examiner?

A. I think the paper was putting it on.

Q. Or sponsored—pardon me?

A. I think the paper was putting it on.

Q. What part did he play in it?

A. I think he gave them the ballroom, and I think he helped give them attractions to publicize it, and he came in to ask for bands to make it much larger.

Q. It was some charity? [1181]

A. Yes, the paper—I think they were putting on these affairs at various places. They put on an affair at Slapsie-Maxie's and Ciro's, and they moved around, in trying to raise money for the war wounded.

Q. That was the occasion on which you gave him Carmen Cavallero?

A. I didn't give them to him. I asked Carmen Cavallero if he would go out and do it?

Q. He was one of your bands? A. Yes.

Q. You helped on that, at least? A. Yes.

Q. Can you tell me when was the next time?

A. I can't tell you what conversation took place the next time and next time. We talked at various times

(Testimony of Lawrence Barnett)

during the year. I remember Mr. Finley came in the office—he came in one time to show me his new car, and he took me over to the garage to show it to me and asked me to take a ride in it. I can't remember all the conversations as they transpired. If you can tell me other incidents, maybe I can remember.

Q. Well, did you go down to San Diego on any occasion and talk to Mr. Finley? A. No.

Q. Can you recall any other conversation you had with [1182] Mr. Finley?

A. Yes, I remember the Charlie Barnet—I think I talked to Mr. Finley a little bit about that.

Q. When was that, sir?

A. I don't remember the exact date when we were negotiating to sell Charlie Barnet there. We had an offer from Birnie Cohen, and Birnie Cohen confirmed it, and then Birnie Cohen called me up and told me he was sorry, Mr. Finley wouldn't let him go that much money for the band; and I think he might have talked to Mr. Howard about it, and I might have talked to Mr. Finley about it.

Q. You offered Charlie Barnet to play at the Casino Room? A. At the Casino Gardens, yes.

Q. And Mr. Finley wanted him also for the Mission Beach Ballroom?

A. Mr. Finley never talked to me about Charlie Barnet for the Mission Beach Ballroom.

Q. You know that Charlie Barnet did play at the Mission Beach Ballroom? A. Yes.

Q. Did you have anything to do with that booking?

A. Yes.

(Testimony of Lawrence Barnett)

Q. Did you make the contracts out?

A. No, but Mr. Barnet talked to me about it in New York [1183] City.

Q. You didn't have anything to do personally with the contracts?

A. No, I believe Mr. Bishop submitted the contracts.

Q. Did you have any part in the preparation of the contracts for the Tommy Dorsey booking, Mr. Barnet?

A. No, Mr. Bishop prepared them.

Q. You talked to Tommy Dorsey, though, while he was in Boston, shortly before he came out to play that engagement, didn't you?

A. I did not.

Q. I mean, by telephone?

A. No.

Q. Did you talk to him at all while he was in the East concerning that booking?

A. No.

Mr. Christensen: Thank you very much, Mr. Barnet.

Redirect Examination

By Mr. Warne:

Q. Just a couple more questions, if you don't mind.

A. O.K.

Q. First, with reference to these Negro orchestras or Negro bands, are there any of them that are considered among the top, so to speak, as a musical aggregation?

A. Yes. [1184]

Q. Are they top—or, rather, is there a top demand throughout the country for those bands?

A. Yes.

Q. Is that true of some of these bands handled by this—what was the name of it?

A. Moe Gail.

Q. Moe Gail?

A. Yes.

Q. Now, I believe I neglected to ask you this directly, if I may be permitted to. Did you ever have any con-

(Testimony of Lawrence Barnett)

versation with Mr. Dailard directly relative to the booking of bands or the non-booking of bands into Mission Beach after Mr. Finley went in— A. No.

Q. —and took it over? A. No.

Q. Did you have any conversation with Mr. Dailard yourself directly relative to the booking of any bands in Pacific Square after Mr. Finley obtained the lease on Mission Beach? A. No.

Q. You said something about the fact that some operators or managers of dance halls or ballrooms make more money without using these top name bands that you have been talking about?

A. That's right. [1185]

Q. Is that correct? A. Correct.

Q. What kind of operations are those?

A. Well, some of them are very large operations?

Q. Are there any locally of that character?

A. Yes. The Zenda Ballroom here in Los Angeles.

Q. Do they use any of these so-called top name bands? A. No.

Q. Do you sell bands or put bands into the Zenda?

A. No, we don't.

Q. What agencies do serve them?

A. I think they have had the same band in there for about, I don't know, maybe eight or nine years—Jack Dunn.

Q. What about any other ballrooms here, or dance halls? A. In Los Angeles, you mean?

Q. Yes. A. The Figueroa Ballroom.

Q. Do you play any bands in there? A. No.

(Testimony of Lawrence Barnett)

Q. Now, throughout the country are there any places where, either now or in the past, your company has booked its orchestras that do not demand the so-called top name bands?

A. Yes, the El Patio Ballroom in San Francisco.

Q. Do you book orchestras in there?

A. We have booked orchestras in there. [1186]

Q. Do other agencies, if you know?

A. Yes, I believe they have.

Q. And what type or character of orchestras?

A. They are semi-name bands.

Q. I see. Now, did you have any discussions with any of the orchestra leaders under contract with M. C. A. relative to the merits of Pacific Square, as related to Mission Beach in San Diego, with reference to performance?

A. Did the conversations take place in San Diego?

Q. No, did you have any such conversations with any orchestra leaders?

A. I don't understand your question.

Q. All right. I didn't think you could. May I re-frame it, please?

Did you have any conversation with any band leader who is represented by your company relative to the respective merits of Pacific Square and Mission Beach as ballrooms in San Diego? A. One.

Q. Who? A. Charlie Barnet.

Q. Was that the conversation in New York, that you refer to? A. Yes.

Q. That is the one you referred to in the cross [1187] examination of Mr. Christensen also? A. Yes.

(Testimony of Lawrence Barnett)

Q. Will you relate it, please?

Mr. Christensen: To which we object as calling for hearsay.

The Court: You did open the door a little on it, I believe.

Mr. Christensen: I didn't ask for any conversation.

The Court: I know, but you opened the door. I will permit him to answer.

The Witness: A. I was in New York City and Mr. Charlie Barnet called me at our New York office, and told me Larry Finley was in town and taking him around, showing him the sights, and that he liked Finley very much, he was a very nice fellow, and would like to play for him in San Diego at Mission Beach, and he wanted to know if we had any objection.

I said, "No, if you want to play down there, it is all right." I said, "You have played for Pacific Square in the past. I think if you go to Mission Beach you might be making a mistake because you might be antagonizing the owner of Pacific Square."

Mr. Barnet said he didn't care, he would like to play for Larry Finley because he was a nice fellow. I said, "O.K."

Mr. Warne: No further questions. [1188]

Recross Examination

By Mr. Christensen:

Q. So he insisted on it anyhow, even though you advised against it? A. I didn't advise against it.

Q. You told him he was making a mistake, didn't you?

A. Well, that isn't advising against it.

(Testimony of Lawrence Barnett)

Q. Hadn't Charlie Barnet played at Mission Beach before?

A. I don't know. I don't think so during the time Larry Finley had it. If he played there when Dailard had it, I would have to look up the records before I could tell you.

Q. You did not look up the records before you told him he was making a mistake in playing at Mission Beach, did you? A. No.

Q. You were afraid he would make Dailard mad, weren't you?

A. Wait a minute. Dailard didn't have Pacific Square at that time, so I wasn't afraid he would make Dailard mad.

Q. No, you thought he would make Finley mad if he played at Pacific Square?

A. No, Dailard didn't have anything to do with Pacific Square when Barnet played at Mission Beach.

Q. He didn't? A. No.

Q. When did he play at Mission Beach? [1189]

A. He played over Christmas and New Year's, and the first week of January.

Q. And Finley had the Mission Beach Ballroom at that time? A. That's right.

Q. And Dailard—or, Stutz had Pacific Square?

A. That is correct. Now you are right.

Q. It was Stutz now that you were worried about?

A. That's right.

(Testimony of Lawrence Barnett)

Q. Now, let's take up some of these ballrooms. The Zenda Ballroom, where is that, sir?

A. It is downtown here in Los Angeles. I don't know whether it is on 7th or 8th, one of those streets in there, near Figueroa.

Q. Have you ever been there? A. Yes.

Q. Is that one of those you walk upstairs to?

A. That is correct.

Q. Do you know the capacity of it?

A. Well, I could give you my estimate of it.

Q. What is it?

A. I would say around 3,000 people.

Q. All right. That is more or less of an old folks' dance hall, isn't it? A. I wouldn't say so. [1190]

Q. All right. You wouldn't call that a first-class ballroom, would you?

A. I think it is a very nice little ballroom.

Q. Is it comparable to the Trianon in San Diego?

A. I have never been in the Trianon in San Diego, so I wouldn't know.

Q. Now, this Figueroa Ballroom, where is that?

A. That is on Figueroa.

Q. Where?

A. I think it is down past Washington. I am not sure of the exact street.

Q. Is it near the corner of Figueroa and Washington?

A. I don't know if it is Washington. It might be Pico. I am not sure. It is down on Figueroa.

Q. Have you been there? A. Yes.

(Testimony of Lawrence Barnett)

Q. Would you book Tommy Dorsey into the Zenda Ballroom? A. No.

Q. Or Xavier Cugat? A. No.

Q. Or Harry James?

A. I wouldn't book it. If the band wanted to play there, he could play it.

Q. Now, the same thing with reference to the Figueroa Ballroom. Would you put any of those bands in there? [1191] A. I wouldn't do it, no.

Q. What band is over there at the Figueroa Ballroom? A. Pete Pontrielli.

Q. Has he been there very long?

A. I think he has been there quite a while, yes.

Q. It is a house band, isn't it?

A. I think he owns the ballroom, too. I am not sure.

Q. Another one you mentioned was the El Patio in San Francisco. Where is that located?

A. That is on Market Street.

A. I wouldn't do it, no.

Q. What band is over there at the Figueroa Ballroom?

A. Pete Pontrielli.

Q. Has he been there very long?

A. I think he has been there quite a while, yes.

Q. It is a house band, isn't it?

A. I think he owns the ballroom, too. I am not sure.

Q. Another one you mentioned was the El Patio in San Francisco. Where is that located?

A. That is on Market Street.

Q. Where?

A. I don't know the exact address, but it is on Market. It is downtown, in the heart of town.

(Testimony of Lawrence Barnett)

Q. Do you know near where?

A. I don't know the cross streets there. I think it is Van Ness. I am not sure.

Q. That would be up near the Civic Center, if I am correct?

A. A. Correct.

Q. Is that a second-floor ballroom?

A. It is a second-floor ballroom, yes, you go up the stairs, and a very nice ballroom.

Q. That, you say, would book semi-name bands; is that right?

A. That's right. [1192]

Q. A semi-name band is one which is known locally or in particular territory, isn't it?

A. No, a semi-name band can be known across the country and still be semi-name.

Q. What would be the difference, sir?

A. Well, we are going into a tough thing. What do you mean, what would be the difference?

Q. Between a semi-name band which is known across the country, and a name band?

A. Well, Bernie Cummins is known across the country and is a semi-name band, in my opinion.

Q. You have given me an illustration instead of an answer. Could you give me an answer?

A. Then I will take Bernie Cummins, and I say a name that is known across the country and still isn't a top name band.

Q. Now, I would like to have you tell me the difference between a semi-name band known throughout the country and a name band.

A. Well, I don't know where the semi-name stops and the name starts. That is pretty hard to tell you, where

(Testimony of Lawrence Barnett)

the name starts. I might have an opinion on a band, and you might have an opinion on a band, and you might think it a top name and I might think it is a semi-name band. Everybody's opinion is different on that. The orchestra leader might think he is a top name band. [1193]

Q. Well, then we take it in the order of name bands, semi-name bands, and no-name bands?

A. There might be some more categories than that. I don't think you can put it in three categories.

Q. What would be the fourth?

A. I could say a little-name band, a medium-name band, and a little bigger name band, and a top name band. Those may be four categories. It is hard to say where the categories stop and start.

Q. The name bands are those which have gotten publicity and made a name for themselves nationally; isn't that right?

A. That is not right.

Q. What else?

A. The name band is a very large category. A band can be a name band here in Los Angeles and may not be a name band in other sections of the country, and they may not know him in other sections.

Q. Well, Tommy Dorsey is considered a name band? You do consider him a name band?

A. I certainly do.

Q. Why do you consider—

A. I would say he is a top name band.

Q. Why do you consider him a top name band?

A. He has a name attached to an organized orchestra; he makes records; he does very big grosses at the box offices; [1194] he is known from coast to coast; he has made pictures; there is a big demand for him.

(Testimony of Lawrence Barnett)

Q. Now, Jimmy Dorsey is in the same class, isn't he?

A. He is a big name band, like Tommy Dorsey.

Q. As a matter of fact, they even get write-ups in national magazines, don't they?

A. That's right.

Q. It is one of the things that contributes to their being one of these name bands, is it not?

A. It could contribute to it.

Q. The advertising that they get?

A. To those two bands you are talking about?

Q. That is true with all your name bands, isn't it?

A. No, some bands get national publicity and they are still just known in Los Angeles.

Q. What would you say makes—I will withdraw that, and ask you: you consider Xavier Cugat as a name band?

A. I class him in the same class as Tommy Dorsey.

Q. What is it that makes him a name band?

A. The same qualifications I gave for Tommy Dorsey.

Q. Now, is Harry James a name band?

A. I would say a top name band.

Q. Now, what are the qualifications that make him a name band?

A. Well, the same qualifications I gave for Tommy [1195] Dorsey.

Q. Well, now, Benny Goodman is a name band, isn't he?

A. He is a top name band.

Q. The same qualifications, is it?

A. Right.

Q. In other words, they are known from coast to coast, and you mention the name and everybody knows it?

A. Practically every one knows Benny Goodman that is acquainted with orchestras.

(Testimony of Lawrence Barnett)

Q. Now, Charlie Barnet, you consider him a name band?
A. I say a top band.

Q. And the same qualifications, he is just known from coast to coast, isn't he?
A. That's right.

Q. And Jan Savitt would be another illustration, wouldn't he?
A. He is a top name band.

Q. For the same reasons?
A. It is possible, yes.

Mr. Christensen: All right. Thank you very much, Mr. Barnett.

Redirect Examination.

By Mr. Warne:

Q. Just one question, I believe. You answered the question to Mr. Christensen that you would not book Harry [1196] James or Tommy Dorsey into the Zenda Ballroom. Tell us why you wouldn't book them into the Zenda Ballroom?

A. Well, it would not be good business to book Harry James there.

Q. Good business for whom?

A. For the band leader. First of all, the ballrooms he mentioned have a limited capacity and can't pay the money that the Casino Gardens could pay, or the Palladium could pay, and it doesn't make sense for such a band to play down there when they could go somewhere else and make more money.

Q. In considering the relative position of Mission Beach and Pacific Square, in advising any band leader, would you consider the same matters that you have now referred to?

A. Well, they might be a little different, in my own personal opinion.

(Testimony of Lawrence Barnett)

Q. Give them, please.

A. One is that I would much prefer to play a band at Pacific Square than Mission Beach because I don't think the weather bothers the band as much at Pacific Square. Then the transportation is better to Pacific Square. People can walk over there, if they want to, and there are a lot of servicemen in the town at present who don't have cars, who walk to Pacific Square and go in the ballroom. Then Pacific Square has been playing name bands for the past four or five years, and they have established a place to play them, and Mission [1197] Beach has been playing cowboy bands, and I think the bands, in my opinion, can gross more money at Pacific Square than at Mission Beach.

Q. In coming to that conclusion are you concerned with what, relative to the bands that you represent?

A. I don't understand your question.

Q. Are you concerned with the welfare of the ballroom owner, or are you concerned with the welfare of the bands?

A. Concerned with the welfare of the bands, because if you book him in there and he doesn't do well, the owner doesn't want him back. If the band does well, the owner wants him back, and we create a demand for the band.

Mr. Warne: No further questions.

Recross Examination.

By Mr. Christensen:

Q. Well, going to a ballroom then is somewhat of a habit, is it? A. I don't think so.

Q. It would not make any difference, then, whether people have been going to the particular ballroom or not,

(Testimony of Lawrence Barnett)

but they would go wherever the best band was playing; is that right?

A. It might be; it could be possible. Sometimes with a big name band people will go to a ballroom they don't usually go to. But if you put them, say, in the Civic Auditorium, [1198] for instance, and people don't like it, people don't like to dance there, they won't go there.

Q. In other words, then, you create a place for them?

A. If it is an excellent place, you would have no trouble getting name bands, providing you built up a policy.

Q. You haven't been down to Mission Beach since Mr. Finley has had it, have you?

A. Yes, I was down there.

Q. When? A. About three weeks ago.

Q. What was the occasion of that?

A. I was down to San Diego.

Q. Well, how did you happen to go out to Mission Beach? A. Just went out and looked at it.

Q. Did you go in? A. No, it was locked up.

Q. Did you go there in the daytime?

A. I went there in the daytime; just went out and looked in the ballroom.

Q. So you looked in from the outside?

A. That's right.

Q. Now, other than that occasion three weeks ago, when were you last in San Diego?

A. September of 1944, I believe.

Mr. Christensen: That's all, sir. [1199]

Mr. Warne: No further questions.

The Court: We will take our recess, now, ladies and gentlemen, and remember the admonition and keep its terms inviolate.

(A short recess was taken.) [1200]

The Court: All present. Proceed.

Mr. Doherty: Mr. Dailard.

WAYNE DAILARD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

Further Direct Examination.

By Mr. Doherty:

Q. Mr. Dailard, since you were on the stand yesterday did you secure the books of record of the Mission Beach enterprises in San Diego? A. Yes, sir.

Q. Are those the books that were delivered here in court which I referred to this noon? A. Yes, sir.

Q. And those that are now being worked upon by the auditor representing the plaintiff at the table?

A. That is correct.

Q. I have already delivered to counsel for plaintiff a copy of the statement I am now showing to you. From what sources was the information contained in that statement that I have handed to you gathered?

A. It was taken from our books, the books of Mission Beach Enterprises.

Q. And who assembled the data for you? [1201]

A. Mr. Rothman, certified public accountant.

Q. And did he do so at your direction and under your instructions? A. That is correct, sir.

Q. Was that data taken from your books by him?

A. Yes, sir.

Q. And you believe it to be correct?

A. Yes, sir.

(Testimony of Wayne W. Dailard)

Q. Did you pay your income tax on the basis of the figures contained in that statement?

A. Yes, sir.

Mr. Christensen: Well, that is objected to as being immaterial.

The Court: Overruled. The answer will stand as given. Read it, Mr. Reporter.

(Answer read by the reporter.)

Mr. Doherty: I offer at this time, your Honor, as the defendants next exhibit in order—

Mr. Christensen: May it be received subject to further check, because we have not had the opportunity? I presently know of no objection.

Mr. Doherty: It is understood, your Honor, that Mr. Dailard will hold himself available for cross examination on this after counsel for the plaintiff and his auditor have a chance to check it against the records. [1202]

The Court: Very well.

Mr. Christensen: That is the understanding I have.

The Court: It will be conditionally marked as an exhibit, subject to whatever corrections are necessary to be made in the statement, if any.

Mr. Doherty: Yes, sir.

The Clerk: Defendants' Exhibit P.

(The document referred to was marked as Defendants' Exhibit P, and was received in evidence.)

Q. By Mr. Doherty: What is the item of \$153,797.55 on this exhibit?

A. It represents the income from the ballroom.

Q. For what year? A. For the year 1944.

Mr. Christensen: Forgive me, please, will you? Show me where you are reading, sir.

(Testimony of Wayne W. Dailard)

The Witness: Right here at the top of the page.

Mr. Christensen: Thank you.

The Court: Have you a copy of that statement? Is that the only one?

Mr. Christensen: Would you like to borrow mine?

The Court: No, no. I do not want yours.

Mr. Doherty: Here is one, your Honor.

Q. And immediately beneath that item is the total of \$128,540.52; and what does that represent? [1203]

A. That represents the total operating expenses.

Q. Against what operation?

A. Against the ballroom operation.

Q. And those two items I have had you mention are totals, the first being income and the second being expenditures of the ballroom as distinguished from the concessions? A. That is correct, sir.

Q. And making up the total of \$128,540.52 were four different items. Will you please read off and tell us what they are?

A. We have salaries, \$12,751; we have supplies and expenses, \$4,603.10; advertising, \$17,078.14; music and entertainment costs, \$94,108.28.

Q. I will call your attention just to two of those items; first, advertising, \$17,078.14; what was included in that item as advertising, the type of advertising and the places put and what did it advertise?

A. Well, it advertised all the bands appearing at the Beach ballroom. It was comprised of newspapers, in some instances billboards, radio advertising, and posters for the lobby. That is the only items I can recall.

(Testimony of Wayne W. Dailard)

Q. Now, the next item, the large item there, is \$94,-108.28, music and entertainment costs. What type of music and entertainment was made up in that total? [1204]

A. That figure embraces the cost of bands and other artists appearing as attractions at the Mission Beach ballroom.

Q. That was the total spent for that purpose?

A. That is correct.

Q. What was your operating profit from the ballroom for that year? A. \$25,257.03.

Q. The rest of the figures on that Exhibit P from which you have been reading are confined to the operation of the concessions? A. That is correct, sir.

Q. Excepting certain general overhead?

A. That is correct.

Q. I will call your attention to one item down here under "overhead expenses": "Travel and entertainment for the year 1944." What was the total travel and entertainment expenses of the entire operation, both the ballroom and the concessions for that year?

A. \$290.00.

Q. And what was the net profit from the entire Mission Beach operation, both ballroom and concessions, for the year 1944? A. \$80,364.73.

Q. And I believe you have made the statement that on that you paid income taxes on the basis of those figures? [1205] A. That is right.

(Testimony of Wayne W. Dailard)

Mr. Doherty: Do you wish to cross examine now, Mr. Christensen, or after your auditor has checked the records?

Mr. Christensen: If I may defer, I would prefer it. And, Mr. Dailard, you are going to bring me certain of your advertising copies. Did you bring those?

The Witness: No; I haven't, Mr. Christensen.

Mr. Christensen: Please try and do it.

The Witness: Yes. We will have to subpoena those records from the newspapers. We have some on file but not the full complement.

Mr. Christensen: Do what you can, will you?

The Witness: I will.

Mr. Christensen: Thank you, sir. That is all now.

Mr. Doherty: I think that is all, Mr. Dailard. You will hold yourself subject to call. Could you, Mr. Christensen, indicate about when you would be ready for him, because Mr. Dailard has other matters to attend to, but we will get him here by telephone.

Mr. Christensen: If Mr. Dailard will give me his telephone number, I will advise him in time, if that is agreeable with you, sir.

Mr. Doherty: Will you give him your telephone number where you can be reached at your home?

(Mr. Christensen and the witness conferring privately.)
[1206]

Mr. Warne: Shall I proceed, your Honor?

The Court: Yes.

Mr. Warne: Mr. Ross.

N. J. ROSS,

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: N. J. Ross, R-o-s-s.

Direct Examination.

By Mr. Warne:

Q. Mr. Ross, you are an attorney at law?

A. I am.

Q. Practicing in an office in this city? A. I am.

Q. A member of what firm?

A. Pacht, Pelton, Warne, Ross & Bernhard.

Q. You are the Ross of that firm, is that correct?

A. I am the Ross in that firm.

Q. In the year 1944 and in the year 1945 you and your firm were acting as attorneys for the Music Corporation of America? A. We were.

Q. Did you have a conversation with Mr. Desser? You know Mr. Desser? [1207] A. I do.

Q. What is his first name? A. Arthur.

Q. And the name of the firm is what, of which he is a member? A. Desser, Rau & Christensen.

Q. Did you have a conversation with Mr. Desser relative to Mr. Finley during the year 1945? A. I did.

Q. Do you know the date?

A. It was February the 2nd, 1945.

Q. Have you a recollection of that conversation?

A. I have.

Q. Was it in person; that is, did you personally meet, or by telephone? A. It was by telephone.

(Testimony of N. J. Ross)

Q. Relate it, please.

A. Mr. Desser called me on the date stated, told me that he represented Larry Finley who had gotten the lease on Mission Beach ballroom. He said Mr. Desser had been to—that Mr. Finley, rather, had been to M.C.A. to try and get some bands. He had been having a little trouble getting some information about them. Particularly, he had booked the King Sisters into the Mission Beach ballroom and found out that the King Sisters were being booked in a week ahead of [1208] the date that he wanted them, into the Pacific Square ballroom.

Arthur said to me that—

Q. That is Mr. Desser?

A. Mr. Desser said, "I know Jules Stein. I know if I told him about this, he would do something about it. He would not tolerate it, but I thought I would talk to you about it first. I would like to have you talk to Finley and get his story and help him out, if you can."

I told him I would find out what there was about it and report back to him.

Q. At that time did you make any memorandum?

A. I did.

Q. I show you Defendants' Exhibit N for identification and ask you what that document is?

A. That is the memorandum I sent immediately following the conversation I had with Mr. Desser.

Q. Reading that memorandum, if you will look at it, please, does that refresh your recollection as to any other subject matter of the conversation you had with Mr. Desser on the 2nd of February, 1945?

A. Yes.

(Testimony of N. J. Ross)

Q. What?

A. Desser said to me that if something was not done about it he was going to file suit against M.C.A. to restrain [1209] them from having a monopoly on the bands; that Finley had a lot of money invested in this thing and he was going to get bands for him if he had to file a suit to do it.

I told Desser I didn't see on what basis he could possibly claim that they had a monopoly, or that the matter he was discussing was something that could be the subject of a suit to restrain a monopoly. I told him that didn't make sense, but I would see what I could do about it, on the basis that he had called me as a friend, and I would talk to M.C.A. about it.

Q. Was that the sum of the conversation as you now recall it?

A. No; there is something else that is reflected by the memorandum. He told me that Ames Bishop—or, rather, that Wayne Dailard in making his bid for the ball-room before the City Council of San Diego had represented that he had an exclusive contract with M.C.A., by reason of which exclusive contract only he could bring attractions into San Diego. That was the prefatory statement he made about why he would file a suit to restrain monopoly if he did not get bands for Mission Beach for Finley. I incorporated that into this memorandum.

Q. What did you do with the memorandum?

A. I sent it to Larry Barnett.

Q. To any other officers of the company? [1210]

A. I sent copies of it to Ames Bishop and to Taft Schreiber.

(Testimony of N. J. Ross)

Q. Who is Taft Schreiber?

A. Taft Schreiber is the vice president of Music Corporation of America, one of them.

Mr. Warne: I renew my offer, if the court please, into evidence of the memorandum, Defendants' Exhibit N for identification.

Mr. Christensen: We offer the same objection.

The Court: Objection sustained.

Q. By Mr. Warne: Subsequently, Mr. Ross, did you have any other conversation with Mr. Desser about this same subject matter? A. Yes, I did.

Q. Approximately when?

A. It was some time after I had had an opportunity to get some information on these facts that he had discussed with me, and it was about February—well, I had telephone conversations with him, probably, within the week; but I saw him again on February 15th, or saw him on February 15th.

Q. Following the sending of this memorandum to Mr. Barnett and the other persons named, did you talk to Mr. Barnett or to Mr. Bishop or anybody else at M.C.A.?

A. I talked both to Mr. Barnett and Mr. Bishop and Mr. Howard. Hal Howard. [1211]

Q. At their offices or at your office?

A. At their offices.

Q. And was there discussion of this request for bands and the claims that were asserted by Mr. Desser, as he had related to you and as you have related here?

A. Yes, there was.

Q. What was related to you at that time by Mr. Barnett?

(Testimony of N. J. Ross)

Mr. Christensen: To which we object as calling for hearsay.

The Court: That is the same subject matter, ladies and gentlemen, that I have already instructed you concerning heretofore. There are several defendants in the case, some of them persons, natural persons, and one corporate entity. One of those—two of them in fact, are those concerning whom the witness has just stated the conversation was had. You will consider it as to them, but unless it is connected up more specifically, it is not to be considered as to the other ones.

Mr. Warne: May I ask an additional foundational question?

Q. Who was present when you discussed the matter with Mr. Barnett?

A. Mr. Bishop and Mr. Howard.

Q. Relate the conversation there at that time?

A. I asked them to report to me in connection with the [1212] situation that Mr. Desser had presented to me. Mr. Bishop told me that he had been down to San Diego in an effort to help Dailard get the contract or the lease for Mission Beach. He said that—now, I don't remember whether Bishop said this or Barnett; they both talked at the same time. He told me that Dailard had been a valued customer of Music Corporation of America for many years; that he had used bands at a time when he was losing money in Mission Beach; that he had been established in the business in San Diego; he had gotten a very fine reputation as an operator of a ballroom, probably one of the finest in the country; he was a responsible per-

(Testimony of N. J. Ross)

son; he had money; they had no hesitancy in booking bands with him.

As to Finley, they had never heard of him before. He had some political background; he came into San Diego as a person who had decided to take over Mission Beach and through political influence had been able to get the bid away from Dailard, although Dailard's bid had been better than Finley's. Finley had never been connected with ballroom operations before.

They told me they didn't see how they could turn their backs on Dailard and give Finley bands, particularly in view of the fact that there were not many bands out here. There had been a time when motion picture studios were making a lot of pictures with bands in them, and when that cycle was [1213] the vogue there were a lot of the bands that came to the Coast. That was not a very popular thing at the moment and studios had stopped making band pictures. As a consequence of that, there were not too many bands on the Pacific Coast that could be available for dates of this kind.

They told me, also, that they had a contract with Dailard which gave him the first refusal on the bands that they would have available; that as far as bands that were available, Jan Garber had played in Mission Beach and the Pacific Square at repeated performances two or three times a year; Skinny Ennis had had to do the same thing before he went into the service; Bob Crosby had to do the same thing.

They said that if they wanted to, there were not enough bands here to give both Mission Beach and Pacific Square.

(Testimony of N. J. Ross)

In addition to that, they said they felt that Pacific Square and Mission Beach could not operate in the same period within the same area. Mission Beach had made a successful operation out of Western bands after Dailard had tried everything else and found out that the popular bands could not make money; that if he attempted to put popular bands in Mission Beach, it would compete with Pacific Square and neither one of them would make any money.

They could not conscientiously recommend two ball-rooms of the same type within the San Diego area, although that might not be true in another vicinity where they had a [1214] different type of population.

They discussed these things out with me. They told me that they did not know what they could do to help. I pointed out to them that we did not want any lawsuits if we could avoid it. They told me there was no solution; that even if Dailard turned down a band, that there wasn't any bands for Dailard to turn down so that Finley could have them.

I told them to send me the contract which they had referred to, the contracts with Dailard; I wanted to look at them.

Q. Subsequently was there shown to you or did you see this contract, Defendants' Exhibit F?

A. Yes; I saw it.

Q. Did you examine it? A. I did.

Q. Did you have any other conversation with Mr. Barnett and Mr. Bishop relative to that contract?

A. I did.

(Testimony of N. J. Ross)

Q. When with reference to the first conversation was your discussion with them as to the contract?

A. Probably within four or five days.

Q. Would you relate it, please?

Mr. Christensen: To which we object as hearsay and self-serving.

The Court: The same ruling as heretofore made. The [1215] objection is overruled.

A. I went up to see Mr. Barnett in Beverly Hills. I told him I had examined the contract; that if they could still get bands—that, as to the contract, I saw nothing in it that was wrong. I could understand why Dailard, who had been a valued customer for all these years and with whom they had had these dealings, was certainly entitled to normal consideration; but if they could get any bands or if there were any available, that they ought to try and find out what there was so that Finley might be able to get some bands.

Q. By Mr. Warne: By the way, upon any one of these occasions when you were there was there any discussion of the King Sisters? A. Yes.

Q. Which one?

A. At this conversation with Barnett, Bishop, and Howard.

Q. Will you relate it, please?

A. I asked them about the King Sisters situation. I told them that Desser had mentioned that to me specifically and it seemed like some explanation was in order. And Bishop told me that the King Sisters had been—that Dailard had wanted the King Sisters when they were available and he booked them. He didn't know whether

(Testimony of N. J. Ross)

they were being sub- [1216] mitted to anybody else, and after he had completed the booking, he found out that Finley had called for them for the following week.

Q. Now, subsequently did you talk—I believe you said you did talk to Mr. Desser? A. Yes; I did.

Q. And what did you tell Mr. Desser?

A. I call Mr.—

Mr. Christensen: Would you lay a foundation?

Mr. Warne: Well, I believe he did before.

Q. About when was that?

A. Probably the day after I had my meeting with Barnett, Bishop and Howard.

Q. On the telephone?

A. I called him on the telephone and I told him what the result of my conversation was. I told him that it was a difficult thing to just pick up and have bands available, just because Finley came into the territory; that they did owe some allegiance to Dailard; and that that situation just could not be solved at the moment, but I would see what I could do.

He told me that he wanted me to talk to Finley, anyway, so that I could get the whole story first-hand. He wanted me to meet him. And I told him I would be glad to talk with him when Mr. Finley was available. [1217]

Q. Subsequently did you see or talk to Mr. Desser about this? A. I did.

Q. When?

A. On February the 15th Mr. Desser called me on the telephone.

(Testimony of N. J. Ross)

Q. Was there a telephone conversation then occurred?

A. There was a telephone conversation. He told me that Mr. Finley was in his office and he would like to come down to the room. We were both in the same building.

Q. And did they come down? A. They did.

Q. Did you have a conversation in the office?

A. Yes; I did.

Q. Relate it, please, assigning to each one what was stated in substance.

A. They both came in. Mr. Desser introduced me. He said, "Joe, I want Larry to tell you the whole story on this thing himself so you can have it first-hand."

And Mr. Finley proceeded to tell me that he had the right connections in San Diego and he got this Mission Beach thing and he was going to make it go. He had some great ideas in mind. He was going to make it a very successful operation; that he wanted to get a lot of big bands out there. He was not interested so much in how much the bands cost—[1218] or cost, rather, because the concessions, the popcorn and hot dogs or these other things that they sold in the ballroom and the Amusement Center would carry the load if only he could get attractions to bring them into the place.

He told me that Bishop had been down there to get or to support Dailard in his application; but he told me that there wasn't any opportunity of Dailard getting it because he was in San Diego and that was it.

He discussed also the fact that he had a different policy in mind with reference to the admission price. He wanted to charge only \$1.25 as top admission, he didn't care who the attraction was; that he could afford to charge that lit-

(Testimony of N. J. Ross)

tle because he would make up his profit from the other concessions around the Amusement Center.

As far as he was concerned, he only wanted to operate Saturdays and Sundays; that, to his mind, that was more profitable and he could forget about all the other time that they might have available.

We talked, too, about Casino Gardens. I don't know how that conversation came up.

I told him that I represented both Tommy and Jimmy Dorsey, who at that time owned the Casino Gardens ball-room; and he told me that he wanted to—he would like to get into that operation; said he had heard that they were looking to sell the lease. [1219]

I told him I didn't know anything about it; they were both in New York; I hadn't heard it. And either he or Desser suggested that if I would be good enough to send a wire to New York to Tommy or to Jimmy, to see whether there was any possible basis for buying into the enterprise, that he would like to do it. And Finley told me, he said, "You do this and we will all make a little money. I will see that you get a piece."

I told him that I was not interested in anything like that, but I would be glad to make the inquiry.

That, I think, concluded the conversation on that occasion.

Q. Did you send the wire?

A. I sent the wire that day.

Q. Did you get a reply?

A. I got a reply the following day.

Q. Did you communicate that to him?

A. I called Arthur Desser and told him that the ball-room is not available for a deal.

(Testimony of N. J. Ross)

Q. Was there any discussion on the occasion when Mr. Finley and Mr. Desser were in your office of Mr. Finley getting bands for some certain dates?

A. No; that occurred later. There was, however, one other matter in that conversation that I have not stated.

Q. All right; relate it. [1220]

A. Desser told me in this same conversation that he meant to get bands for Finley even if he had to file a lawsuit to get it, and that it certainly would not make sense, but they were going to file suit under the Sherman Anti-Trust Act.

I then discussed with him again the fact that I didn't think there was any basis for it; that it didn't make any sense. I was doing what I could to find out what the situation was, and that you just couldn't come in and cast aside a relationship such as M.C.A. had with Dailard, but that if he would be patient, perhaps something would work out.

Q. Was there a suggestion of getting some dates that Mr. Finley wanted? A. That occurred later.

Q. I see. Will you relate that, please, and how it occurred?

A. One or two days later, Desser called me and told me that Finley had submitted a list to him of different dates in April and May, of Saturday and Sunday dates in April and May on which he hadn't been able to make any arrangements for bands, and could I at least find out if bands would be available at that time.

I made a memorandum of the dates. It may have been that Finley came in with it or called me, but I know that [1221] pursuant to that list of dates, I then sent another memorandum on to M.C.A.

(Testimony of N. J. Ross)

Q. In the meantime, had you had any discussions with Mr. Barnett and Mr. Bishop about the situation there?

A. Yes, I had. I had told them—I had reported back to them my conversation with Desser and Finley, and still told them that if they could get some information on the situation, it might be helpful to let me know.

Q. I show you Defendants' O for identification and ask you what that document is?

A. This is a copy of the memorandum that I sent out to Larry Barnett on February the 20th.

Q. Does the memorandum there refresh your recollection as to any other matter of conversation either with Mr. Finley or Mr. Desser or Bishop and Barnett?

A. Well, it refreshes my recollection in this respect: That although I had talked to Barnett on these occasions and told him that if we could get bands, I would rather see them have some bands made available to Finley. He told me that he didn't see how that was possible because they could not now tell when bands would come in in the future, and they couldn't tell when the bands did come in who Dailard would take or who he would not; and they could not anticipate the itinerary of any of these bands at this moment. He knew that at this time, at the time I was discussing it with him, [1222] and within the few weeks immediately following that there were not any bands that Finley could have had, even if they had felt free to submit them to him without submitting them to Dailard first.

This, then, was a list of the bands which Desser had given me—

(Testimony of N. J. Ross)

Q. Bands?

A. A list of the dates, rather, that Desser had given me, which I submitted to Barnett and asked him to consider them and see what he could do.

Mr. Warne: I again offer, if the court please, Defendants' O for identification.

Mr. Christensen: I offer the same objection.

The Court: The same ruling, sustained.

Q. By Mr. Warne: Subsequently to that time did you have any conversation with Mr. Desser or with Mr. Finley before the lawsuit was filed?

A. Yes. I talked with Mr. Desser after the memorandum of February 20th was sent. I had seen him on one or two occasions in the building. I told him I hadn't any news for him yet, but if he would only be patient, why, something would be worked out.

Q. Something would be worked out; you were referring to what?

A. Well, worked out in the way of perhaps getting the [1223] bands for Mission Beach, doing something about the situation of the paucity of bands and the fact that Dailard had a first refusal commitment with M.C.A.

Q. Was there any other conversation before the lawsuit was filed?

A. There was none that I can recall, because two or three weeks, or about three weeks later, I left for New York.

Well, yes, there was one conversation. In one of the conversations—I think it was the one that I had with Finley and Desser—Finley told me that he had it on good authority that Ames Bishop was being paid off by Wayne Dailard. And I told him that if I—I couldn't believe

(Testimony of N. J. Ross)

such a situation to exist; and that certainly, that if such a situation existed, it would not be tolerated by the company or Mr. Stein or anybody; that I knew that Dailard and Wayne (Bishop) were friendly, others had told me, and I knew that Dailard—or, rather, Bishop took care of the San Diego account. That I would check that, because I was particularly interested in finding that out as to the condition of the company. And subsequently I did report back to Desser that there wasn't anything that I could find or anything from the information I had obtained which indicated such an arrangement or such a condition to exist.

Q. Did you make inquiry of Mr. Barnett in that regard? [1224] A. I made inquiry of Mr. Barnett.

Q. And anyone else of the company, M.C.A.?

A. Mr. Bishop and Mr. Schreiber.

Q. Mr. Schreiber? A. Yes.

Q. Was there any other information that you had available which might acquaint you with the fact, or possibly acquaint you with the fact of any so-called pay-off of Bishop?

A. I prepared Mr. Bishop's income tax returns for the past five years, and I knew no such sums had been reflected in it.

Q. Income tax returns to the Federal Government?

A. Federal Government and the State.

Q. Do you know Mr. Bernie Cohen? A. I do.

Q. Are you also a member of the South of Tehachap-
pee Golf aggregation? A. I am.

(Testimony of N. J. Ross)

Q. Was there an occasion when you played golf at Hillcrest Country Club with Mr. Cohen, some week or so prior to the commencement of this trial?

A. It was on Saturday, January the 19th.

Q. Who played with you on that occasion?

A. Taft Schreiber and Harry Friedman. [1225]

Q. And Bernie Cohen and yourself, of course?

A. That is right; yes.

Q. Was Mr. Finley mentioned on any occasion during the time that you saw Mr. Bernie Cohen that day?

A. Yes; he was.

Q. Who else was present?

A. Just Mr. Cohen and myself.

Q. And where were you at the time?

A. I was having lunch in the grill room of the club.

Q. That is, the two of you were? A. Yes.

Q. Relate the conversation, please?

Mr. Christensen: To which we object as hearsay and not a proper form of impeachment. He should state what it is.

The Court: In what respect? There are two ways to impeach a witness; one is by asking the specific matter that the witness concerning whom the particular impeachment is sought stated; the other is to ask him to state what was said.

Mr. Christensen: I was of the opinion that, in order to avoid the hearsay rule, it would be necessary to simply ask those questions for which a foundation has been laid.

The Court: Well, that is the better way, but it is not the sole way. The jury will have to make the comparison between the two statements, if they conflict. I think both ways are proper. [1226]

(Testimony of N. J. Ross)

Mr. Christensen: Very well, your Honor.

The Court: The better way is always to direct the witness' attention, especially where you have a transcript. That is the most secure way. It does not then depend upon the frailty of human thought, but you have the precise statement in the record and you can ask the other witness whether such and such a conversation occurred and he can give his version of it. But I do not know of any rule that makes that necessary. It is not the easiest way with which to follow impeaching evidence.

Mr. Warne: I realize that. It was with deliberation that I asked it this way, if I may be permitted.

The Court: Very well, overruled.

Q. By Mr. Warne: Relate the conversation.

A. Cohen said to me, "You know, I am out of Casino Gardens now."

I said, "Yes, I know that."

He said, "Joe, isn't there some way that I can help you in this lawsuit?"

I said, "Well, what can you do?"

He said, "Well, I want to testify." He said, "I want to come to the trial and testify for you if you need me." He said, "I am glad I am out of Casino Gardens. Finley is a phoney." He used some other language I would rather not repeat. He said, "All the time that I thought that he was [1227] going back to New York and being for me with the Dorseys, he was knocking me to the Dorseys. Lee Eastman, who is out here from New York, told me that he used to run me down in front of them; and if he is supposed to be a ballroom operator, then he don't know the business. If I spent as much money as he did out at Casino Gardens, I would have gone broke 15 years

(Testimony of N. J. Ross)

ago. But I want to do something about it if I can. Before, I couldn't say anything."

I said, "Well, I am not handling the trial and I will talk to Warne, or whoever it is, and see what the situation might be."

He says, "Well, if I can help, please let me know. I want to do whatever I can to help you in the trial."

And there wasn't any other conversation.

Q. After that you played golf?

A. After that we played golf.

Mr. Warne: You may cross examine. [1228]

Cross Examination

By Mr. Christensen:

Q. You know that he did appear here and testify on behalf of the plaintiff? A. I was here.

Q. And you know he was asked if such a conversation took place? A. I know that.

Q. And you know he said no such conversation took place? A. He did. I know that.

Q. Now, Mr. Ross, on the occasion when you and Mr. Finley and Mr. Desser had a conversation in your office, and the date you fixed, I believe, is February 15th of 1945,—correct? A. That is correct.

Q. On that occasion did you say to Messrs. Finley and Desser that you don't trust Dailard?

A. I don't recall that I said anything like that.

Q. And that you don't trust Bishop?

A. I did not say that.

Q. Did you say that Dailard was no good?

A. I did not.

(Testimony of N. J. Ross)

Q. Did you say that there was something with reference to finances which had occurred while Mr. Dailard was connected [1229] with Collonade's in his management of the Casino Gardens, and you were going to sue him?

A. I did not.

Q. And did you say to them on that occasion that there was some tie-up between Bishop and Dailard?

A. I did not. That was said by Finley to me.

Mr. Christensen: That is all.

Mr. Warne: That is all. Jules Stein. Take the stand, Mr. Stein. You have been sworn.

JULES STEIN,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Warne:

Q. Mr. Stein, you have already testified that you were president of the Music Corporation of America and certain of the other corporations about which Mr. Christensen interrogated you as a plaintiffs' witness. Do you recall that fact? A. Yes.

Q. Now, these other corporations, which are termed—I believe you termed them at that time, or he did, affiliates, will you tell us generally what those corporations are, with reference to the subject-matter of their business, how they operate, and why? [1230]

A. They are either affiliates or subsidiaries, and the prime purpose for them was to get around the jurisdic-

(Testimony of Jules C. Stein)

tional problems that are involved in the business. For instance, the Music Corporation of America is licensed by the American Federation of Musicians. M.C.A. Artists is licensed by the Four A's. The Four A's refers to the Screen Actors Guild, the American Federation of Radio Artists, the American Guild of Variety Artists, and Actors Equity. The purpose of the separate corporations was so that we could, as closely as possible, keep the business in the respective corporations that are involved with the various guilds and unions concerned, so that in inter-jurisdictional disputes that might develop there would be no difficulty, because they are not all related, although they are members of the American Federation of Labor. It was primarily to avoid difficulty such as we see presently in the motion picture industry. They are separate corporations. There are separate accounting systems, and separate tax returns are filed.

Q. Now, this corporation of which Mr. Barnett is the secretary, that he doesn't know much about except that he hires the janitors, what about that?

A. That happens to be the Movie Corporation, which owns the building at 9370 Burton Way, in which the other corporations are tenants, and since it has no employees except [1231] perhaps the grounds keeper and perhaps the watchmen, it was purely a bookkeeping problem and Mr. Barnett was asked to be the secretary since he did the buying and since it is necessary to have corporate officers for federal and tax purposes.

Q. That company does not engage in any branch of the amusement business, as such?

A. Definitely not.

(Testimony of Jules C. Stein)

Q. When was Music Corporation of America formed, as a corporation? A. Organized in 1924.

Prior to that time had you been personally engaged in the booking business? A. Yes.

Q. Booking what types of entertainment?

A. Orchestras.

Q. Also known as bands, I believe you explained?

A. Right.

Q. That is, in later years they have become known as bands rather than orchestras?

A. It is rather a synonymous term.

Q. When you first started in the booking business, under what name did you start?

A. Well, originally under my own name.

Q. Subsequently, when you organized the corporation, [1232] did you first take the name of Music Corporation of America?

A. No, there was a prior company called Ernie Young, which later went out of business, and in 1924 M.C.A. was formed, the present company.

Q. At that time were you familiar with the fact that there were other booking agencies in the business of booking bands and other forms of entertainment?

A. Yes.

Q. Can you name some of them?

A. Well, some of the outstanding ones were Benson of Chicago, Meyer Davis of Washington, Philadelphia, New York and Boston; Emil Coleman in New York; and a firm by the name of National Attractions.

Q. And was there such a firm as William Morris?

A. The William Morris Agency was the outstanding agency of the business, yes.

(Testimony of Jules C. Stein)

Q. Is that the same William Morris Agency that still is in existence? A. Yes, the same one.

Q. It was the outstanding agency then, and at the present time how does it rank?

A. It is still the outstanding agency in some forms of the amusement business, or branches, I should say, of the amusement business.

Q. When you started out, I take it, you secured [1233] employment contracts to represent band leaders or agency contracts to represent band leaders, somewhat after the fashion they do now?

A. Very similar to the present contractual form.

Q. At that time had the American Federation of Musicians prescribed a form which was required?

A. There was no form at that time. That developed later, and I am not sure, but I would say offhand about ten years ago, along with the licensing of agencies.

Q. Subsequently, I take it, you had a list of bands that you represented? A. Right.

Q. Your office, when you started this business, was where? A. Originally Chicago, Illinois.

Q. About when was it that you moved to some other place, or enlarged?

A. Well, I think the New York offices were opened about 1927 or '28, which was followed by our offices here in the Oviatt Building in Los Angeles.

Q. About when?

A. I am inclined to believe that was in the early '30s.

(Testimony of Jules C. Stein)

Q. Were there any other places in which offices were opened up?

A. Yes; the next office, I believe, was in Dallas, Texas, [1234] some few years later; then Cleveland; and the Detroit office was just recently opened.

Q. Now, in the meantime, as you opened these offices—well, may I ask you this: Did other booking agencies have offices in some of these other cities?

A. That developed about the same time, and somewhat followed the development of our business, and particularly as the one-night stands were developed, others came in with similar orchestras and followed in this unique plan of playing bands, which was new, in the dance area. That is, when the popularity of dance bands developed through radio and records, others, offices like William Morris, who had offices in places ahead of us like in New York, Chicago and here, opened offices, and agencies like General Amusement opened up offices at these various points; and Frederick Brothers. As a matter of fact, General Amusement Company, I think, have an office in Cincinnati at the present time, and we do not have one there.

Q. The William Morris office originally had an office in New York?

A. Yes. I think they are the oldest agency now existing in the agency business. They were founded by William Morris, Senior, who died some ten or fifteen years ago.

Q. And there is a son, William Morris? [1235]

A. William Morris, Junior, yes.

Q. Now, then, at any time, or, when you got into the band-booking business—we will call it “band-booking”,

(Testimony of Jules C. Stein)

and that rather short-cuts it—did you learn about the customs in the agency business, as it relates to entertainment and amusement?

A. Well, there were many customs that had been going on in this business long before we got into it.

Q. And, generally, you learned about them; is that right? A. Right.

Q. Was there any custom of split commissions, as you first learned the business?

A. Split commissions are perhaps as old as the agency business itself.

Q. Describe it, please.

A. It is a custom which developed in the negotiations for engagements where other people were perhaps representing them. It is a common practice. It existed in the days when we first were in business, and as long as I can remember, and it exists up to the present date.

Q. Now, when you first got into the business, did you split commissions with any agent? A. Right.

Q. That is, any other agents? [1236]

A. Yes.

Q. Can you mention any one of them, in particular?

A. Well, for a number of years we were splitting commissions with the William Morris Agency on the orchestras we represented that were booked by the theatres. A number of orchestras were playing the theatres throughout the country, and like the common custom, we split commissions with them fifty-fifty for many years.

Q. When you booked attractions in theatres, they demanded a split commission? A. Yes.

Q. And you paid it? A. Right

Q. You say fifty-fifty? A. Right.

(Testimony of Jules C. Stein)

Q. What was the going rate of commission at that time?

A. The going rate, as a custom, always is ten per cent.

Q. Numerous other agencies have developed since that time— strike that. There were numerous other agencies existing throughout the country at that time, were there not?

A. Yes, many agencies, representing perhaps a sectional type of business.

Q. And subsequently, other agencies developed?

A. Many of them. [1237]

Q. I believe you mentioned the fact, or some one has mentioned here, Mr. Wonders, perhaps it was, that there was a licensing arrangement which was created by the American Federation of Musicians. Is that correct?

A. Correct.

Q. That requires every agent who acts as an employment agent for a band or attraction or for musicians to be licensed by the American Federation of Musicians?

Mr. Christensen: To which we object as leading and suggestive.

The Witness: The license—

Mr. Warne: That has been testified to, your Honor. That is the reason I put it in that form.

The Court: I didn't think there was any question about that, Mr. Christensen, the mutuality of arrangement between the American Musicians Union, I call it for a short-cut, and the agencies that book bands? I thought you had agreed on that.

Mr. Christensen: I do agree that there is a requirement of a license to be had.

(Testimony of Jules C. Stein)

The Court: I don't see any objection to the question. It has been gone over and over again with two or three witnesses, who have testified to it.

Mr. Warne: It was preliminary, your Honor.

The Court: Very well. Overruled. Answer it. [1238]

The Witness: Yes.

Q. By Mr. Warne: I show you a little booklet carrying a legend list of booking agents and sub-agents, dated February 1, 1945, on the cover, and ask you if you are familiar with that booklet? A. I am.

Q. What is it, please?

A. It is a list of agencies throughout the United States.

Mr. Christensen: Just a minute. May I offer the objection that there is no proper foundation, and that the book itself will speak for itself.

Mr. Warne: I am not trying to introduce it, except to describe it generally.

The Court: It describes itself. It does not need any one to describe it. Sustained.

Mr. Warne: All right.

The Court: That is, if it is in the English language. I haven't looked at it.

Mr. Warne: I read it in English, and I presume it is English,—shall I say, A. F. of M. English?

I would like to offer this as the Defendants' next in order, please.

Mr. Christensen: To which we object as no proper foundation. [1239]

The Court: Sustained. Will you let me see that book?

Mr. Warne: Certainly.

The Court: So that I may follow you, gentlemen.

(Testimony of Jules C. Stein)

(The document referred to was handed to the court.)

The Court: I have looked at it. Mark it for identification.

The Clerk: Defendants' Exhibit Q for identification.

(The document referred to was marked as Defendants' Exhibit Q, for identification.)

Q. By Mr. Warne: Mr. Stein, from whom did you obtain this document or this pamphlet, Defendants' Exhibit Q, for identification?

Mr. Christensen: To which we object as being immaterial.

The Court: Overruled.

The Witness: A. It was delivered to us, as agents, from the secretary of the American Federation of Musicians.

Mr. Christensen: To which we object on the ground it is his conclusion or opinion.

The Witness: It said so in the book.

Mr. Christensen: May that be stricken, please?

The Court: Yes. Don't volunteer, Mr. Stein.

The Witness: I am sorry.

The Court: I presume that is technically correct. It will be sustained.

Q. By Mr. Warne: Let me ask you this,—[1240]

The Court: There is a way of proving the authenticity of a document that is purported to emanate from a specific source.

Mr. Warne: May I inquire of counsel and see if we can't avoid it?

(Discussion between counsel off the record.)

(Testimony of Jules C. Stein)

Mr. Warne: I will withdraw the further questioning on that line at this time. Perhaps we can cure this another way.

Q. By Mr. Warne: Now, M.C.A. is engaged in what business?

A. In the booking, counseling and representing of orchestras.

Q. Generally, do you know how the business functions, how you do this, that is, your relation with the band leaders et cetera, and how you built your organization?

A. Well, a great deal of it has been described, but it is a fiduciary relationship which we have with the leaders of orchestras, in which it is our purpose and intent to book, counsel and advise these orchestra leaders to the best of our ability, so that they will secure the maximum returns and the type of engagements which is proper for them to perform, and such that will enhance their length of value in the amusement business.

Q. Is there competition in that field between agents?
[1241]

A. There is very keen competition.

Q. Is there a general description applicable to this type of business in which Music Corporation of America engages?

A. I don't understand the question.

Mr. Christensen: Just a minute. I didn't either. I won't make an objection to it, now.

Q. By Mr. Warne: I will put it this way: Would you say that it is a personal service corporation?

A. It definitely is a—

Mr. Christensen: Just a moment. To which I object as his opinion or conclusion.

(Testimony of Jules C. Stein)

Mr. Warne: I didn't mean to use the word "corporation."

Q. By Mr. Warne: Is it a personal service type of business, rather than corporation?

Mr. Christensen: To which we again object as calling for a conclusion or opinion.

The Court: It puts the words into the mouth of the witness.

Mr. Warne: That is true.

The Court: If you want to ask him what it is, you should do so without telling him what it is and then asking him to approve it.

Mr. Warne: I would agree. I will withdraw the question in the form in which it is presented, your Honor.

The Court: Very well. [1242]

Q. By Mr. Warne: The work that you do, or the work that your company does is in the nature of what kind of work, other than you have described?

A. Well, I said it is a fiduciary relationship in which we represent the leaders of various orchestras. It is a relationship of trust, of confidence, in which we are the servant, and the leader of the orchestra is the master.

Q. Now, in that work that you do, and in that representation in which you engage, do you have occasion to discuss with the band leaders from time to time their business?

A. My personal contact is not such at the present time, but it is the primary concern of all those that are in our employ to counsel and advise in respect to everything in connection with the activities of the orchestra leader with regard to his engagements.

(Testimony of Jules C. Stein)

Q. What about the matter of prices? Is that discussed with him?

A. The prices are definitely discussed with all orchestras. They have the sole determination of where and how they play, and for what compensation.

Q. How is that arrived at? How do you get at that?

A. It is arranged by negotiation. Also, a great factor is the law of supply and demand. If you have attractions, or orchestras in this case, and if the number were greater than the number in demand, the prices would probably [1243] go down, as they have in several cycles in our industry. During the recent war period the demand has exceeded the supply and it is just impossible to fill the demand that there has been for these orchestras. There are so many ballrooms and other places of amusement that would like to have the orchestras that if you divided them into ten, it would still be difficult to supply the demand. The demand that we have had over recent years is the reason that orchestras are known by their names in contrast to where the orchestra would carry and advertise under ten or fifteen names, as did the Benson orchestras of Chicago years ago. Now, with the situation as it exists, it is impossible to meet the demand, because there is only one Harry James, and one Jimmy Dorsey, and he can play in only one place at a time, and due to the fact that these orchestras are so greatly in demand by ballroom owners, theatres, night clubs, beaches, motion pictures, radio, they will select the type of engagement they think they would

(Testimony of Jules C. Stein)

like to perform best, and they accept our advice in many cases, because the longer the orchestra can be popular the longer it is to our benefit and to their benefit. Many orchestras will wait around here in Los Angeles in making a picture and will not even go out and perform engagements we would like to have them to, because they feel the income wouldn't justify the type of work that is involved.

Mr. Christensen: May that be stricken, your Honor, as [1244] his conclusion or opinion?

The Court: The last portion of the answer was not responsive to the question and will be stricken.

Mr. Warne: Very well.

Q. By Mr. Warne: Have you discussed with any of these persons known as band leaders the matter of their going out and playing, after they are making a picture, or while they are making a picture?

A. I have had infrequent discussions in the last year or two. Before that, considerable.

Q. With what persons? Can you give us the names of those persons?

A. Guy Lombardo, Kay Kyser, Harry James, Jan Garber, Bernie Cummins, Coon-Sanders, Joe Reichman, Jan Savitt, Ted FioRito, and many others.

Q. Would they tell you their desires?

Mr. Christensen: Just a moment. To which we object as calling for hearsay.

The Court: Sustained.

(Testimony of Jules C. Stein)

Q. By Mr. Warne: Would you counsel and advise with them relative to the type of entertainment, or, rather, the type of employment that you felt they should undertake?

A. They would on various occasions want to see me with respect to the idea possibly that there were other types of engagements they would like to perform other than those they [1245] had. Practically every band wants a motion picture engagement or a radio engagement. Many of them have thought I could be of personal help and they could get such an engagement, and I was always glad to discuss it with these artists and leaders at any time that they desired.

Q. Was there any engagement—

The Court: Gentlemen, we are not going to finish with this witness tonight, so I think we will suspend now until Monday morning at 10:00 o'clock.

Mr. Warne: Yes, your Honor.

The Court: Ladies and gentlemen, remember the admonition, and keep its terms inviolate.

Mr. Christensen: Your Honor, if I am a few minutes late, may Mr. Jaffe take my place?

The Court: Yes, but we will start at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p. m., Friday, February 8, 1946, an adjournment was taken until 10:00 o'clock a. m., Monday, February 11, 1946.) [1246]

Los, Angeles, California, Monday, February 11, 1946.
10 a. m.

The Clerk: No. 4328, Larry Finley, et al., v. Music Corporation of America, et al.

(Thereupon the following proceedings were had outside the presence and hearing of the jury:)

The Court: Gentlemen, I have called you here in the absence of the jury to inform you that we have received word this morning that juror, Patsy D. Edwards, is ill with the flu at home. I have just talked with Mr. Edwards on the telephone, endeavoring to ascertain the condition a little more specifically than just the announcement that she is ill. Mrs. Edwards, of course, is conscientious about her duty here, and was preparing to leave home this morning to attend court when she was taken with what her husband thinks is an attack of the flu. She became so debilitated that she felt she should return to bed, where she is. That is about all the information he could give me. I asked him whether there was a physician in attendance. He said, "No." I asked whether she had a temperature, and he said he didn't think so, but that she had a sore throat and some other evidences of cold, and that they didn't know, of course, what the situation might be, and there was no way of her determining or his determining whether she would be available tomorrow or later.

Mr. Christensen: We are willing to stipulate that the [1248] case may proceed with eleven jurors.

Mr. Doherty: May I speak to counsel just a moment?
(Discussion off the record.)

Mr. Doherty: We feel, your Honor, as counsel has expressed it. As your Honor has indicated, she may be

tied up for two or three days, and we are willing to proceed with eleven jurors instead of twelve, and that she may be excused permanently from the case.

Mr. Christensen: That is right.

The Court: Very well.

Mr. Doherty: While the jury is not here there is one other matter we might discuss. The lease between Mr. Finley and the City of San Diego is not in evidence. May it be agreed that the lease is not a separate one for the ballroom and a separate one for the recreation park, but that it is just one lease and there is but one obligation between Mr. Finley and the City?

Mr. Christensen: We are willing to offer our own office copy into evidence.

Mr. Doherty: Why encumber the record? I would rather the stipulation that there is but one obligation between Mr. Finley and the City for the ballroom and the recreation park, rather than a separate obligation and lease for each.

The Court: And you could mark the copy of the lease for identification, without having it incorporated in the [1249] record.

Mr. Christensen: What you say is true, Mr. Doherty.

The Court: Very well. It is so understood and so agreed to.

Mr. Christensen: Of course, your Honor, there is a separate stipulation—

The Court: Now, wait a moment.

Mr. Christensen:—as to the percentage which should be paid. You are familiar with that?

Mr. Doherty: We are not going into percentages. We make no issue of percentages; merely one obligation.

Mr. Christensen: That the lease, or, that by that lease Mr. Finley was let the entire park, including the ballroom; is that it?

Mr. Doherty: Yes.

The Court: Very well. It is so understood and so agreed.

Mr. Christensen: And as to the time, it was for a period of three years commencing on the first of January, 1945.

Mr. Doherty: Yes, for three years, beginning as of January 1, 1945, or January 3, 1945. There seems to be some difference here as to the date.

Mr. Christensen: I think the third is the correct one, but two days I don't think will make any difference.

Mr. Doherty: I assume your Honor will make a brief [1250] statement of our stipulation to the jury rather than our going into detail?

The Court: Yes.

(Thereupon the proceedings were resumed in the presence and hearing of the jury:)

The Court: The record shows that all the jurors, other than juror, Mrs. Patsy D. Edwards, are in the jury box. So stipulated, gentlemen?

Mr. Christensen: So stipulated, your Honor.

Mr. Doherty: So stipulated.

The Court: Ladies and gentlemen, I am sure that you share the disappointment of the court and counsel for both sides that Mrs. Edwards is not able to be here this morning. We were informed, and we had checked the reliability of the information which disclosed that she is ill and that the probability of her returning is somewhat uncertain. Both sides of this case have realized the situation,

and all of the parties are desirous of proceeding with the celerity that the case should have, and, accordingly, they have stipulated that the case may proceed with eleven jurors, the eleven now in the box, and that Mrs. Edwards be excused from further duty.

That is your understanding, gentlemen, and the stipulation?

Mr. Doherty: It is so stipulated, your Honor.

Mr. Christensen: It is so stipulated. [1251]

The Court: And Mrs. Dabbs, so that you won't be all alone there, I would suggest that you move over, please.

Now the jury is all present, and you may proceed.

Mr. Doherty: Would your Honor make a statement with respect to the stipulation on the lease?

The Court: I think you may make the statement, Mr. Doherty, and Mr. Christensen may check it.

Mr. Christensen: Very well.

Mr. Doherty: We have stipulated that the lease between Mr. Finley and the City of San Diego is one lease for the ballroom and the recreation park, one document; no separate document for the ballroom and another document for the recreation park, but it is one lease for both the recreation park and the ballroom.

Mr. Christensen: That is correct, your Honor. There is but the single lease by which Mr. Finley has a three-year lease, beginning on or about the 1st of January, 1945 and covering the entire Mission Beach Amusement Park, including the ballroom.

Mr. Doherty: So stipulated.

The Court: The period of the lease is for three years?

Mr. Christensen: Three years.

The Court: Beginning on or about January 1, 1945.

Mr. Christensen: That is right.

Mr. Doherty: Yes. [1252]

The Court: So understood, ladies and gentlemen, without any further evidence.

Mr. Warne: Mr. Stein, will you take the stand, please?

JULES C. STEIN,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

Mr. Warne: If the court please, before proceeding with the further examination of Mr. Stein, I believe we can dispose of one or two matters by stipulation.

Counsel for the plaintiff is willing to stipulate, I am informed, that Mr. C. L. Bagley, a resident of Los Angeles, if sworn as a witness here, would testify that he is the vice-president of the American Federation of Musicians, which has been mentioned here, and that of his own knowledge Defendants' Exhibit Q for identification, is a book and publication of that organization, being a list of booking agents and sub-agents, and that the document referred to is the list as published, according to the records of the Federation, as of February 1, 1945.

Mr. Christensen: Upon counsel's statement, I will waive any further foundational requirements, and that may be introduced in evidence. I did not talk to Mr. Bagley, but I will take Mr. Warne's statement. [1253]

The Court: Very well. So ordered.

The Clerk: Exhibit Q in evidence.

(The document referred to was marked as Defendants' Exhibit Q, and was received in evidence.)

(Testimony of Jules C. Stein)

Mr. Warne: That he would further testify that the copy of the constitution and by-laws, a printed volume which has been exhibited to counsel in court, and which I have here, which is dated 1944, is the constitution, by-laws and standing resolutions of the American Federation of Musicians as of January 1, or February 1, 1945.

Mr. Christensen: I will raise no objection to its introduction in evidence.

The Court: It may be received and marked. It need not be copied in the record, however, at this time, nor need Exhibit Q be copied into the record, unless you desire it copied, gentlemen?

Mr. Warne: We do not desire it copied at this time. If any portion is read, that is another matter.

The Court: Yes.

The Clerk: Exhibit R in evidence.

(The document referred to was marked as Defendants' Exhibit R, and was received in evidence.)

Mr. Warne: With reference to Exhibit R, Defendants' Exhibit R, we have made, for the convenience and use of counsel and perhaps of the court and jury, certain excerpts [1254] which are specifically identified and which are put in type-writing for ease in reading. I would like to offer those as our No. A or our No. 1, if that is permissible, or some appropriate designation in number. I have had them conformed with the exhibit itself, the provisions of the exhibit, and they are copied from it.

Mr. Christensen: I haven't seen it, but subject to further inspection, let it go in at this time, and with the understanding that I may check it later. I don't want to take the time now to do it.

(Testimony of Jules C. Stein)

The Court: It will be so received. What will it be, Mr. Frankenger?

Mr. Frankenger: R-1.

(The document referred to was marked as Defendants' Exhibit R-1, and was received in evidence.)

The Court: Proceed, gentlemen.

By Mr. Warne:

Q. Mr. Stein, you are familiar with Defendants' Exhibit Q, which was shown you here the other day?

A. I am.

Q. Your company is listed as a licensed agent therein?

A. We are.

Q. Together with other companies, and particularly the companies that you have mentioned upon the witness stand?

A. We are one of a list of over 1,000 licensees of the [1255] American Federation of Musicians.

Q. These being licensed agents; is that correct?

A. Licensed booking agents throughout the United States, and I think some in Canada.

Q. Now, when we recessed the other day, we had been questioning on and discussing the matter of the nature and character of the counsel and advice rendered by your company to the band leaders whom it represents. There was no discussion in that with reference to the matter of prices. Are you familiar with the matter of the pricing, that is, the fixing of the compensation which the band leader demands for the performance of himself and his orchestra?

A. I am reasonably familiar with it, yes.

(Testimony of Jules C. Stein)

Q All right. Will you explain how that is done?

A. Well, primarily it is the business conditions which relate as one of the main factors in pricing. Prices go up and down in the amusement business perhaps faster than in other lines of industry, and the law of supply and demand again is a main factor. The greater the demand for orchestras, the higher the price, and the greater the public patronage, the higher the price, because as a rule these attractions or orchestras will play on a guarantee and percentage basis, particularly in the one-night stands. However, prices are higher in hotels, cafes, theatres, and other places of amusement when business conditions are better. [1256]

The leader has his costs by virtue of the number of musicians, their transportation from place to place, his union taxes and surcharges, and the prices will be greatly determined by his success in the various engagements he performs.

There is no regularity of prices. It is not unusual that an orchestra leader will want to play certain types of engagements where prices are considerably lower, or where the employer cannot pay what other places might.

Q. Can you give us an example of that?

A. For example, one of the classical examples which happened this last summer was in the case of Harry James, who went to New York from here and played the Astor Hotel, and he received I think either \$3,000.00 or \$3,500 a week for his orchestra. He played every night of the week, I think from about 7:00 o'clock until after midnight, and Saturdays a little later; and still he would go to the Paramount Theatre, which was next door to the

(Testimony of Jules C. Stein)

Astor Hotel, which he played either before or shortly after, and he received \$10,000.00 a week.

Hotels and cafes cannot pay quite the prices that other places of employment will pay. The higher prices are paid by motion pictures to orchestras. The next highest prices are paid probably by radio performances. One-night stands might come in about the same category, or perhaps higher than [1257] theatres. The lowest prices are paid hotels. First, they don't quite do the business that the others can do and they have greater costs of operation, such as service, waiters, food, and, as a matter of fact, until the recent boom in business over the last three or four years, it was pretty rare for hotels to make money even at the prices they paid orchestras.

Q. That is on the dining-room operation?

A. That is right, on the dining-room operation by itself.

Q. Now, you spoke of the fact of the number of musicians as determining a part of the cost or a part of the price. Is it just the number, or are there any other factors in relation to the employment of musicians other than the number that might increase the cost?

A. There is a basic minimum which the union requires, and they cannot pay below that, but the rest of the price depends greatly upon the popularity of the orchestra itself.

Q. What about the popularity of the artist, that is, the individual musician?

A. I mean of the leader, because the leader is primarily the person that lends this popularity. While there have been great changes in the number of musicians in the orchestras in recent years on account of the draft,

(Testimony of Jules C. Stein)

on account of the man-power for the armed forces, the changes have not [1258] been so great since the war period. The chances are there will be greater stability after this war period.

Q. In your counsel and advice to the band leaders and orchestras whom you represent, are there occasions when you recommend them playing at a place that has a lower rate? You spoke of the Astor Hotel versus the theatre engagement of Harry James, for instance. Tell us what is done in that respect.

A. Our primary concern is to see that the orchestra leader retains his popularity as long as possible and that his earnings shall be as high as possible commensurate with the maintenance of his career for as long a period as possible. For this reason we will often recommend and suggest that they play types of performances that will be to their enhancement. Certain types of engagements might include broadcasting and recording possibilities. Many of the orchestras like to play in New York City where they are close to the publication of new tunes, or they are close to the recording centers, and since New York City is still considered the theatrical center of the world, they will all try to spend a great deal of time there. Second to New York today is, I think, Los Angeles, because of the radio broadcasting and motion pictures. However, motion pictures in the last year or year and a half have become less interested in orchestras, since apparently they have outlived the great [1259] value which they had for the two or three years previous to the last year or two.

(Testimony of Jules C. Stein)

Q. In your work of counseling and advising, are you required to know available places such as theatres, ballrooms, hotels, et cetera, where the bands and orchestras perform?

A. We are required to know, or, at least expected to know, every place of amusement in the United States and Canada which can employ our orchestras.

Q. Now, in your counseling and advising do you consider the relative value of places of employment?

A. We are supposed to present to the leader our reasons perhaps for employment in certain places of engagement in preference to others. That is perhaps where we are expected to counsel and advise with our leaders.

Q. Now, in that regard, that is the providing, or, rather, the knowledge of places, proper places of employment, do you canvass from time to time the operation of a particular operator of a place, such as a ballroom or a theatre, with reference to the possible engagement of orchestras?

A. Well, we do as best we can, but it is general knowledge by the playing of engagements and the rates that orchestras receive, and with the general knowledge in the trade it becomes a matter of an inherent or perhaps intuitive judgment as to what is the best advice to give, from our point of view. [1260]

Q. You say the best advice. You are concerned with what?

A. With advising our orchestra leaders to the best of our ability so that they will perform the type of engagements that will be to their best advantage.

(Testimony of Jules C. Stein)

Q. I see. Of course, you get a commission on their successful, or, rather, upon all of their engagements; is that correct?

A. We receive a commission on all of their engagements.

Q. With reference to the matter of commission, are you familiar with the net commission earned by your company during the last year?

A. Commissions are based upon 10 per cent of the gross of the engagement performed by the orchestra, and up to 20 per cent on what we call one-night stands. The reason for the higher charges there is because of the tremendous amount of work involved in each individual engagement, as related or as compared to engagements of a week or longer.

While the commissions are stated at 10 per cent and up to 20 per cent, that does not apply upon a gross figure, because you have to allow the orchestra leader a deduction for all transportation incurred by himself and his orchestra, and you have to allow him a deduction for the union taxes, the surcharges, and many other charges he has in relation to an engagement of that type. The transportation on one-night [1261] stands is very high, and, therefore, while we speak of commissions up to 20 per cent, the average is considerably lower. As a matter of fact, the total percentage on all orchestras booked for the past year represented slightly under 9 per cent for our company.

Q. Now, some mention has been made, and I believe you were asked the gross volume of business done by

(Testimony of Jules C. Stein)

Music Corporation of America, and you stated that figure. Am I correct?

A. Well, I was asked whether we did around \$15,000,000.00 gross business. I answered, "Yes." Our gross commission before any deductions whatsoever for our cost of operating the institution ran about one million four.

Q. How many employees has Music Corporation of America?

A. We have approximately 175 employees in Music Corporation of America.

Q. Do you know approximately how many musicians there are in the United States who are members of the American Federation of Musicians?

A. There are approximately 140,000 members of the American Federation of Musicians.

Q. Do you know approximately the number of musicians in the orchestras under contract to Music Corporation of America?

A. I would say between four and five thousand.
[1262]

Q. You spoke about New York as still being the center in so far as musical entertainment or entertainment is concerned. Are you familiar with what area of the country is the best market for bands of the character that have been discussed here in this trial?

A. Well, the greatest market is naturally where the greatest population exists, and since the greatest population exists along the eastern seaboard, or at least in that direction, the greater demand for attractions is naturally from that territory. There are perhaps some additional demands that were created out here during

(Testimony of Jules C. Stein)

this war boom period, but it is not a great increase compared with the demands that have been created in the East.

Q. You have spoken about the competition, in answer to some prior questions, the competition between the agencies for business. Is there any other kind of competition that reflects itself in trying to get these bands or orchestras for purposes of engagement?

A. Well, we have keen competition amongst our own offices because the demand by each office is so great in relation to the attractions available that they are always trying to secure as many of the name bands, as has been introduced here by name bands, to this territory or to the other territory as is possible. There are perhaps other reasons why. Some of the prices have been increased greatly because [1263] of the tremendous demand for attractions, and when these various offers are submitted to the leader for his judgment and approval, he has the final choice of deciding where he would like to go, where he would like to play, and the type of engagement he would like to play.

Q. Now, in the course of your business have you had occasion from time to time to discuss with the band leaders themselves the matter of where they would like to go and where they would like to play, and the nature and character of the engagements they would like to engage in?

A. I used to be very active in that phase of the business, but in the last few years I have not been as active as before, and I only come in contact with some of the leaders occasionally in reference to particular types

(Testimony of Jules C. Stein)

of work they would like to do, where my support is requested. [1264]

Q. You mentioned 175 employees; how many of them are vice presidents?

A. There are 15 vice presidents in our company.

Q. And Mr. Barnett became a vice president when?

A. In January of last year.

Q. He is not a member of the Board of Directors of the corporation?

A. No; he is not.

Q. I don't want to go into this matter of name bands or name orchestras. I believe you have given us a definition of that. But I would like to cover this fact: It has been suggested in the testimony of one witness, Mr. Finley, I believe, that in the matter of orchestras there are orchestras or bands that are equally valuable and that could be said to be equally known nationally. Is that a fact, or what is the fact in that regard?

A. That, again, is a question of public opinion. According to my viewpoint, there is no such thing as an equally important band. Even the polls that are taken by the national trade publications for popularity will always show one orchestra more popular than another. It is a poll similar to what they run for the motion picture industry or the radio industry.

Q. In your dealings with orchestra leaders, it has already been mentioned that you are licensed by the American [1265] Federation of Musicians. What is done with reference to observing those licensing agreements or the licensing agreements which exist?

A. Well, the provisions of the licensing agreement itself is rather specific in what our obligations are and

(Testimony of Jules C. Stein)

what we are expected to do in order to keep our agreements with our attractions or our orchestras in force. In the event there are any disputes at any time regarding our management agreements, the dispute is placed before the International Executive Board of the American Federation of Musicians, whose decision is final as to whether our agreements remain in force or are cancelled.

Q. Is there provision, also, or provisions that have to be observed in order for you to retain the license which you have?

A. We have to provide a minimum amount of work per year at prices that are commensurate with the type of engagements the orchestra has theretofore performed. There is a minimum at which we can book the attractions, and there is a minimum amount of work, which I believe is a minimum of 40 weeks a year; and unless we can secure engagements for a minimum of that amount, upon the terms specified and upon the type of engagements commensurate with the types of engagements the orchestra performed theretofore, they have a right to cancel; and automatically, after the third year, unless engagements are increased by a minimum of 25 per cent over the previous [1266] years, they again have a right to cancel.

Q. Are you familiar with whether or not the employment of so-called top name bands is necessary for the successful operation of the ballroom business?

A. In my opinion, definitely not. Many of the ballrooms and seaside amusement places—as a matter of fact, many of the employment places throughout the United States are not dependent upon so-called name bands, as we have heard it defined by others here, for

(Testimony of Jules C. Stein)

their success. The amount of business that you do has nothing to do with the amount of money that you make, and it is not unusual to expend a lot in an amusement place and find out that you end up at a loss.

Q. Mr. Stein, do you know any ballrooms in the United States that operate on the basis of not using so-called name bands?

A. I can mention some of them.

Q. Would you illustrate, please?

A. Chicago, you have the Merry Gardens, the Paradise Ballroom, O'Henry Park; Detroit, the Greystone Ballroom; New York City, Arcadia Ballroom; Brooklyn, Roseland Ballroom; Boston, State Ballroom; Miami, Flageler's Gardens; Cleveland, Euclid Beach; Norfolk, I think the name of the place is Seaside Ballroom; Point Pleasant, New Jersey, Jenkinson's Pavilion.

There are a number of summer seaside ballrooms that string all the way from Norfolk up through Maine. There is [1267] a place in Galveston, I believe, called the Ballienese—

Q. You have listed a number.

A. —the Fort Worth and Houston—pardon me.

Q. May I ask you this: Are those of recent origin, or have they continued over a period of years?

A. They have operated for many, many years.

Q. I show you defendants' Exhibit F; I believe you signed that contract, Mr. Stein?

A. Yes; I did.

Q. That is the contract with Mr. Dailard and your corporation of May, 1944?

A. Correct.

(Testimony of Jules C. Stein)

Q. Do you know Mr. Dailard?

A. Well, I know him now.

Q. Did you know him before this trial started?

A. No. I was under the impression I had met him once in my office, but I was not sure.

Q. Did you ever have any conversation with him about the operation of this ballroom in Pacific Square in San Diego?

A. Not at all.

Q. Or the operation of Mission Beach?

A. Not at all.

Q. And, I take it, of course, you have had no discussion with him with reference to keeping Mr. Finley from getting bands at Mission Beach? [1268]

A. I have had no conversations with him.

Q. Did you ever have any conversation with anybody with reference to pursuing any course of conduct or doing any acts which would prevent Mr. Finley from securing band attractions at Mission Beach?

A. Definitely not.

Q. Before this lawsuit was started did you know of Mr. Finley in any wise? Had you met him?

A. No; I had not.

Q. Did you know that he operated Mission Beach?

A. I did not.

Q. Did you know of the relative positions of Pacific Square and Mission Beach in any wise?

A. I did not.

Q. When this agreement was signed by you on the part of your company, did you have any conversation

(Testimony of Jules C. Stein)

with anyone of your staff or in the Music Corporation of America relative to this agreement?

A. I believe the agreement was brought in to me by Mr. Bishop. I read the agreement and signed it.

Q. Was it your intention in signing this on behalf of your company to restrict or restrain the business of booking of bands or orchestras to play engagements in the City of San Diego?

A. Definitely not; on the contrary, to create employment [1269] for others.

Q. What do you mean by that?

A. Well, this created a new place of employment, or additional employment, for orchestras that we represented.

Q. Was there ever any act or conduct on the part of your corporation or yourself, or to your knowledge, of Mr. Barnett or Mr. Bishop which had for its purpose the restraining or restricting of the booking or the business of booking name bands or orchestras, or bands or orchestras, in San Diego territory?

A. Definitely not.

Q. Or at any other place? A. Definitely not.

Q. Did you have any knowledge at all of any conversations that Mr. Bishop had with Mr. Flynn and, I believe, Mr. Webster or Mr. Wonders that have been related here as to Mr. Finley's bid and their part in it?

A. Definitely not.

Mr. Warne: You may cross examine.

(Testimony of Jules C. Stein)

Cross Examination.

By Mr. Christensen:

Q. Didn't they ever tell you about it? A. No.

Q. You told me a moment ago or you said a moment ago that one of the purposes of the contract that you signed was [1270] to create a new place of employment for your orchestras in San Diego; that is a correct statement, isn't it? A. Right.

Q. Had you had any difficulty theretofore in finding a place in San Diego for your bands?

A. I don't know how many of our orchestras had performed there previously, but this assured a definite flow of attractions and orchestras, or orchestras into a place, with a man willing to spend the money to put up a building that could give employment to orchestras that we represented, as well as others.

Q. Well, you had been playing your orchestras there in San Diego for a considerable period of time, hadn't you, sir? A. I am not sure.

Q. Well, you know that some of your top bands had played Mission Beach immediately prior to the time of the execution of that agreement, don't you?

A. I presume so.

Q. As a matter of fact, you had a prior contract with Dailard, didn't you?

A. We had the letter agreement for one year prior to this agreement that I signed.

Q. And it contained provisions there for options, didn't it?

A. I understand it is similar to the agreement which I [1271] signed.

(Testimony of Jules C. Stein)

Q. So, as a matter of fact it did not create any new opportunity then, did it?

A. It assured an opportunity for the attractions for the succeeding three years at least.

Q. Could you tell me the average number of musicians in a band? Is there such a thing, sir?

A. I don't think that I could tell the average. You would have to take a list of all the bands in the United States and divide it by the number of musicians that are employed—or, I mean just the opposite, the number of musicians divided by the number of bands there are in the United States. I don't think it has ever been determined.

Q. No; I am talking about bands that you represent, sir.

A. We have never done that, either.

Q. Well, can you tell me how many there are in any particular band of yours?

A. The numbers have fluctuated greatly in recent years, and it would be impossible for me to give the number.

Q. Well, can you give me a list, then, for example, of how many members are there in the Harry James band?

A. Oh, I would think around 20.

Q. And how many in the Jan Savitt band?

A. I really don't know. I would have to guess, and I would say some place between 15 and 18. [1272]

Q. How about the Jan Garber band?

A. I imagine around 15.

Q. How many in the Lawrence Wilkey band?

A. I don't know.

(Testimony of Jules C. Stein)

Q. How many in the Bob Crosby band?

A. He has been in the service.

Q. He has got a band now, you know?

A. Now, but I don't know how many musicians he has got.

Q. You represent Bob Crosby, don't you?

A. I believe we do.

Q. He is playing now at the Palladium here, isn't he?

A. Right.

Q. And Lawrence Wilkey, another one of your bands, is playing at the Aragon now, isn't it?

A. I don't know.

Q. And another one of your bands, the Jan Garber band, is playing at the Trianon now, isn't it?

A. I am not sure.

Q. Another one of your bands, the Jan Savitt band, is playing at the Casino Gardens now, isn't it?

A. I am not sure.

Q. Another one of your bands, the Harry James band, is playing at Meadow Brook now, isn't that right?

A. I think I saw the advertisements in the newspaper.

Q. In addition to these ballrooms which I have just [1273] mentioned, your orchestras play in Long Beach, too, don't they?

A. I presume they would.

Q. And they play in other portions of Los Angeles County, do they not, sir?

A. Yes.

Q. And they play in Orange County, too, don't they?

A. Is that San Bernardino?

Q. Orange County, sir.

The Court: No.

(Testimony of Jules C. Stein)

The Witness: I mean, is that the City of San Bernardino?

The Court: No.

Q. By Mr. Christensen: The City of San Bernardino, Mr. Stein, is located in the County of San Bernardino.

A. I didn't know that. I don't know where Orange County is.

Q. Santa Ana is the County seat. Does that help you any, sir?

A. Well, I presume they would play there.

Q. And they play in different portions of San Diego County, too, don't they?

A. Well, they play all over the United States.

Q. Now, you gave us some illustrations of ballrooms that you say do not use name bands as a policy or practice. All of those you told us about were located many miles from here. [1274] Can you think of any right here in Southern California that would help us?

A. I heard a number of them mentioned here the other day, but they are not as prominent as those I have mentioned in the East. I know of the El Patio ballroom, in San Francisco.

Q. That is not a Class A ballroom, though?

A. Well, that is perhaps as difficult to differentiate as a name band.

Q. Do you know what I mean by a Class A ballroom? What are the first-class ballrooms?

Mr. Warne: May I have that question, please?

The Court: I don't know whether he knows what you mean about it or not. Perhaps you had better tell him what you mean.

(Testimony of Jules C. Stein)

Mr. Christensen: Perhaps that is true. Let me withdraw it and say:

Q. You do know what is meant by a first-class ballroom, don't you, sir?

A. Well, I possibly know one of the most expensively built ballrooms in the United States and use that as a criterion.

Q. Let us take right here in California, where we would all be familiar with it. You would say that the Palladium is a first-class ballroom, wouldn't you?

A. Definitely. [1275]

Q. You would say the Trianon is a first-class ballroom, wouldn't you.

A. Well, it is a question of operation again. They have changed the form of operation, that it might be classified today as using more expensive bands, but they have for many years operated successfully without the expensive bands.

Q. That was under Horace Heit's management?

A. That is now.

Q. And for how long has he had it?

A. I imagine he has had it for two or three years; but it was established many years before that. I think originally it was called Topsy's.

Q. You would say that was a first-class ballroom, now, wouldn't you?

A. Well, I don't know exactly what the classification would be. Is it the amount of money that it costs to put up the building, or is it the fact that they are spending more money for bands? I don't think the cost or the looks of a ballroom is particularly the determining factor.

(Testimony of Jules C. Stein)

Q. What would you say was the determining factor, sir?

A. Well, we know in show business that the combination of a number of factors that make for importance or for value or for draw. I don't think you can put your fingers on any specific ones.

You asked me if the Palladium was a top ballroom. I said, yes. I don't think there is any question there. And I [1276] think the Aragon and Trianon in Chicago are expensive top ballrooms, although they do not use so-called big name bands except occasionally.

Roseland in New York is certainly not in the same category as a ballroom as the Arcadia. It is on the second floor and the Arcadia is on the main floor. With the Arcadia, which is on the main floor and on a level, and Roseland on the second floor, and the Arcadia does not use name bands but occasionally, but Roseland does a bigger business on the second floor.

Q. Can we get to California or Southern California?

A. I can't as readily. I mean, I am not as acquainted with the ballrooms out here as I am with those in the East, because I was more active when I was in the East, and when I came out here I did not spend as much time in the orchestra end of the business.

Q. Then, you can't give us any illustrations here in California, any others except perhaps this El Patio, you say, in San Francisco?

A. El Patio I knew in San Francisco.

Q. But except for that case, you can't give us any others?

A. If you happen to mention things, if I remember, I will be glad to answer them.

(Testimony of Jules C. Stein)

Q. Let me try here. Casino Gardens at Ocean Park, is[1277] that a first-class ballroom, in your opinion?

A. Well, that comes into the same definition, again, as you asked me on Topsy's.

The Court: Just a moment, Mr. Stein.

The Witness: Pardon me.

The Court: I do not believe you should question him about "first-class ballrooms." I can see some objectionable feature to evidence of that kind. The witness has used the word "tops". Maybe that is good nomenclature in this line of interrogation, perhaps more suitable and more characteristic and more accurate than "first-class ballrooms."

Mr. Christensen: I appreciate that. Is that one of the top ballrooms, Casino Gardens, Mr. Stein?

A. Well, I would say no.

Q. Is the Aragon ballroom there a top ballroom?

A. I have never seen Aragon ballroom.

Q. Is the Meadow Brook ballroom a top ballroom, sir?

A. I would say no.

Q. Now, what are the factors, in your opinion, that make for a top ballroom?

A. Well, if you combined the element of cost, such as represented in the Palladium or the Aragon or the Trianon, and you combined that with the performance of, perhaps, expensive bands and you combined it with a good location and with smart, efficient operation, you might have some of the [1278] important assets of a top ballroom. You could have the same assets with the expensive type of building and a carefully planned operation without the use of so-called big name bands, believing

(Testimony of Jules C. Stein)

that a fine policy of operation with the other entertainment features, such as special dance nights and special waltz nights, could achieve, perhaps, as great and profitable an operation, if not more, and have a longer period of popularity and financial success.

The dearth of name attractions is a danger, sometimes, the employment of them in the ballrooms, because the failure to secure enough of them at times and the fact that there are so few of the category that has been mentioned here, so-called top name bands, that sometimes endangers the policy using them, so that some type of another operation would be much more successful and financially profitable.

Q. Can you give me an illustration of one such ballroom in Southern California?

A. Well, I presume the two that were mentioned here the other day, here in town, are making money but—

Q. Well, you don't know anything about them; is that right?

A. No; I don't. I would say the Palladium ballroom is financially successful.

Q. That is the only illustration of a ballroom such as you have described here? [1279]

A. Well, I said I am not too familiar with the operation of the ballrooms on the West Coast.

Q. You have told us of the number of affiliates of M.C.A. Do they have any separate offices?

A. They are housed in the same building. I mean that we have two buildings now here.

(Testimony of Jules C. Stein)

Q. The same employees work in different affiliates?

A. No. There are some of the employees work for more than one company, but they are in the minority.

Q. Mr. Barnett, he is connected with which affiliates?

A. He is employed by Music Corporation of America.

Q. And which affiliates, sir?

A. He is a secretary of Movie Corporation of America, which is not a paid position.

Q. Are any of the positions in the subsidiary organizations paid by the organizations, or are they paid by M.C.A.?

A. They are paid by the respective organizations for which they are employed.

Q. All right. Can you tell us any—well, who is employed by the Artists Corporation—what was it?

A. M.C.A. Artists.

Q. That is right. Now, tell me who is employed by them?

A. Well, I would have to have a list before me; but we have, I would say, approximately 75 or a hundred employees in [1280] that company.

Q. Is either Mr. Bishop or Mr. Barnett employed by that company?

A. Neither one.

Q. Generally speaking, though, the organizations, your affiliates and Music Corporation of America work together, do they not, sir?

A. They are called affiliates and they act as affiliates.

Q. What are the functions, then, of Music—was it M.C.A. Artists, Ltd.? Was that the correct name of it?

A. M.C.A. Artists, Ltd.; yes.

(Testimony of Jules C. Stein)

Q. All right. Now, what are the functions of that company?

A. It represents artists in the field of personal services for artists that appear in places of amusement, primarily motion pictures.

Q. And the California Movie Corporation, what is the function of it?

A. That is just a small company which formerly handled a few radio artists and has been kept active. It is not a very active institution, but its field is similar to M. C. A. Artists, Ltd.

Q. And what is the function of Management Corporation of America?

A. Management Corporation of America is primarily active [1281] in radio bookings.

Q. And what is the function of Management Corporation of America?

A. I thought that is the one you just asked me.

Mr. Warne: That question was just asked.

Mr. Christensen: All right; I will withdraw it.

Q. What is the function of Concerts Corporation of America?

A. That is a new company. It is formed to represent members in the concert field. That is covered by the American Guild of Musical Artists, one of the four A's, licensed by the American Federation of Labor.

Q. Do you not have two corporations known as Management Corporation of America, one bearing the name

(Testimony of Jules C. Stein)

“New York” after it, and the other one bearing the name “California” after it?

A. Yes. The California one is one that is primarily interested in a few real estate developments here, and it is not active.

Q. Do you maintain a—

A. It is not in the agency field.

Q. Do you maintain an office there in your building?

A. It is similar to Movie Corporation of America, which is essentially inactive.

Q. Who are the officers of it? [1282]

A. The officers of Management Corporation of America of California are myself, as president, Leland Hayward, as vice president, Lou Wasserman, as vice president, Mr. Schreiber, as vice president. I am not sure. I think there are a few other officers.

Q. They are also officers of Music Corporation of America? A. Right.

Q. You say that there were additional costs to you in handling one-night bookings as distinguished from what you call permanent, being a week or more; that is correct, isn't it?

A. That is a classification given by the American Federation of Musicians.

Q. All right. Tell me what are the items of additional cost for one-night engagements as against longer engagements—

A. Well, when you—

Q. —from your point of view?

A. What is that?

(Testimony of Jules C. Stein)

Q. From your standpoint?

A. When you solicit and book a permanent engagement of one week or longer, it is usually done by telephone, telegraph, personal contact or letter. When the booking is made, the engagement operates for a length of time, usually considerably in excess of one week, and therefore the costs involved in [1283] continuous contact with that engagement are rather nominal.

When it comes to one-night stands, there is a problem of trying to fill all seven nights a week for the orchestra. There is continuous telephone, telegraph, individual contracts, individual contracts and the supplying of advertising and other materials for that engagement. In a sense, it is practically the same amount of work for each engagement or each few engagements as you would do for an engagement of a week or longer. The costs are many times in proportion to the costs of handling a permanent engagement.

Q. Now, while an orchestra is playing at a ballroom you people check there to see how he is doing, don't you?

A. Well, we get the record of the returns or the results of that orchestra by virtue of the amount of business they do, whether they go into their percentage or not, and the records are rather complete.

Q. I mean you check them during the engagement, not only at the end; isn't that true?

A. Are you referring to one-night stands?

Q. No. I am asking you now concerning those of longer duration.

A. A week or longer?

(Testimony of Jules C. Stein)

Q. Yes, sir.

A. Well, if the orchestra is not doing well, you hear about it very fast. [1284]

Q. Don't you call then to find out how they are doing?

A. Well, there is a contact established between us and the employer, as well as the leader of the orchestra.

Q. And do you do the same thing with reference to your one-night engagements?

A. Well, the exact method in which it is operated to-day I wouldn't know all the details, but you do stay in contact with your employer and with the leader of the orchestra. You establish as close a contact as possible for the benefit of all concerned.

Q. In this list of persons licensed by the American Federation of Musicians—quite a lengthy list—you are not familiar with very many of these people, are you?

A. I would have to see the list to be able to tell you.

Q. Well, for example, I notice in San Diego the first one listed is Warner Austin.

A. You are referring to agencies?

Q. Yes, sir.

A. I thought you meant the people in our company there. You are referring to the agency list. Will you repeat the question, please?

Q. I will withdraw it so we will start again. For example, in the San Diego list you were not familiar, were you, with the first name on that list. Warner Austin, were you?

A. I am only acquainted with a few of the licensees of [1285] the American Federation of Musicians.

Q. Isn't that true even here in Los Angeles?

A. Will you read the list to me?

(Testimony of Jules C. Stein)

Q. Well, now, let me ask you a few of them. Do you know Billy White? A. No.

Q. Do you know Walker Granville Agency?

A. No.

Q. Do you know the Walter Trask Theatrical Agency?

A. No.

Q. Do you know Bill Smallwood? A. No.

Q. You know the Small Company, don't you?

A. Yes.

Q. Do you know Edna Scofield? A. No.

Q. Do you know Mrs. Edna Whiting? A. No.

Q. Do you know Frank J. Rock? A. No.

Q. Do you know the Premier Theatrical Agency?

A. No.

Q. Do you know Otis E. Pollard? A. No.

Q. Do you know Patrick & Marsh? [1286]

A. No.

Q. Do you know National Amusements?

A. Yes.

Q. Do you know Joe Morales? A. No.

Q. Do you know Barry Mirkin? A. No.

Q. Do you know Grace McKee?

A. No, either way.

Q. Do you know the Harold Leyton, Inc?

A. No.

Q. I see that it has Mr. Harold Leyton's name underneath it. Does that help you any? A. Either way.

Q. Do you know Sam Kramer? A. No.

Q. C. C. Westover? A. No.

Q. Lewis Story? A. No.

Q. Lottie Horner? A. No.

(Testimony of Jules C. Stein)

Q. Claire Schwartz? A. No.

Q. Walter Herzbrun? [1287]

A. I think I have heard that name.

Q. I think he used to work for Paramount, if that might help you. He was an attorney for them, isn't that right?

A. I don't know.

Q. Do you know Kenneth Harlan? A. No.

Q. Ivan Eppinoff?

A. He is the leader of an orchestra.

Q. All right. Do you know Ivan Scott?

A. Same fellow.

Q. What is it, the same name? A. Yes.

The Court: You identify him both ways, Mr. Stein.

Q. By Mr. Christensen: That is quite common, isn't it, in the theatrical business to have a theatrical name which may be different from one's true name?

A. It occurs in other places besides the amusement business.

Q. Yes. And it is very common there, isn't it?

A. Yes; more common.

Q. Do you know California Artists Agency?

A. I don't believe I do.

Q. Martha Gaston? A. No.

Q. Kathryn Burns? [1288] A. No.

Q. Joe Bren? A. Yes.

Mr. Christensen: I have read all of the list there now. Thank you very much.

Mr. Warne: I just have one question, and I believe I am through with this witness.

The Court: Go ahead.

(Testimony of Jules C. Stein)

Redirect Examination

By Mr. Warne:

Q. Mr. Stein, these several companies that you have termed affiliates, in addition to separate officers, do they have separate sets of books kept for them?

A. They are separate, independent corporations for which separate books are kept and separate accounts are rendered and separate returns made.

Q. Tax returns?

A. Yes. I stated before that they were separately licensed by the different guilds and unions.

Mr. Warne: No further questions.

The Court: I believe we will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition and keep its terms.

(Short recess.)

The Court: All present. Proceed. [1289]

Mr. Doherty: If the court please, the defendants rest.

Mr. Christensen: Before you do, may I have some questions on your books there of Dailard?

Mr. Doherty: Do you want to recall Mr. Dailard?

Mr. Christensen: No. Yes; it was Mr. Dailard who testified concerning this statement of the Beach Amusement.

Mr. Doherty: Yes.

Mr. Christensen: Yes; I would like to have him before you rest on that, because I have reserved that right.

WAYNE DAILARD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows:

Further Cross Examination

By Mr. Christensen:

The Witness: May I have a copy of it?

Mr. Christensen: That is the only copy I have, Mr. Dailard.

The Court: Here is the other, Mr. Dailard.

Mr. Doherty: There is one here in the exhibits, too, your Honor.

The Court: Yes. You had better use the exhibit, I guess, Mr. Dailard, and give me back mine.

Q. By Mr. Christensen: Mr. Dailard, this statement which you have furnished us and which has been introduced into [1290] evidence as Exhibit P, was prepared when, sir?

A. Well, it was prepared—this re-audit was taken only a couple of days ago. I think the original statement was prepared sometime in January, right at the close of the year.

Q. Well, where is the original audit, then?

A. This is it. I mean this is the same thing that you have a copy of his original audit.

The Court: You are referring to the exhibit now?

The Witness: That is right, sir.

The Court: Exhibit P.

Q. By Mr. Christensen: Who made the audit, sir?

A. Mr. Rathman.

(Testimony of Wayne W. Dailard)

Q. Did you give him that book which you have heretofore brought into court and which is now before you, and which you have identified as your book of accounts?

A. That is correct.

Q. Is that correct? Have I correctly identified it for you?

A. Yes. Yes; this is our original.

Q. And did Mr. Rathman have that?

A. Yes.

Q. Was that made, that audit, made from your books there?

A. You refer to that audit as being the audit that is reflected by these statements; is that your question, sir?
[1291]

Q. Yes; that is identified as Exhibit P.

The Court: Just a moment, gentlemen, please. Let us refer to the exhibit by its designation. That is the audit that is impressed upon Exhibit P in this case?

The Witness: Yes.

Q. By Mr. Christensen: Was that all that you furnished to Mr. Rathman as a basis for this audit, the book which you have now before you, sir?

A. No. We furnished a trial statement, a trial balance, that he coupled the two of them together.

Q. Have you now told me everything which he used in preparing Exhibit P?

A. Yes.

Q. Then, this audit, Exhibit P, simply reflects, does it not, a recapitulation of the matters and things which you say are contained in the book before you?

A. That was the intention; yes.

Q. Can you turn to that book and tell me what check No. 3358, being a check bearing date of July 27, 1944, was for?

A. Check No. what?

(Testimony of Wayne W. Dailard)

Q. 3358.

A. I don't know whether I can even find where they are listed.

Mr. Doherty: Mr. Christensen, if your auditor has looked [1292] through those, he more quickly could point out the place where that was found in the books.

The Witness: I mean, I am very happy to give you anything I can find in here, but I don't know where to find it.

Mr. Christensen: He does not appear to be in the courtroom, sir, or I would have him help you.

Mr. Doherty: Do you know what part of the book it came from?

Mr. Christensen: I do not, personally, Mr. Doherty. I personally did not examine the book, sir.

The Witness: It would be under a check record, I assume, wouldn't it? What is the number and what is the date?

Mr. Christensen: The number is 3358; the date is July 27th.

The Witness: And what year?

Mr. Christensen: 1944.

The Witness: Will you give me the number? Check No. what?

Mr. Christensen: I will repeat. 3358 is the number; July 27, 1944, is the date.

The Witness: It is probably right here. Can you give me something of the detail of the check, who it was made to or the amount of it? Do you have any of that from your record?

Mr. Christensen: Yes. The check was drawn to the order [1293] of Fred Heightfield or Heightfeld.

(Testimony of Wayne W. Dailard)

The Witness: Fred Heightfeld on the 27th?

Mr. Christensen: Yes, sir.

The Witness: That would be 3358?

Mr. Christensen: Yes, sir.

The Witness: For \$416.80.

Mr. Christensen: Yes, sir. What was that for?

A. I have no idea without the voucher supporting it.

Q. Do you have those vouchers?

A. I don't have them here, no. He was in our employ. It could have been—I have no idea what it was.

Q. You say he was in your employ?

A. I think he was at that time; yes.

Q. What were his duties?

A. I think he was a press agent.

Q. Well, you say "you think"?

A. That is what I said; yes.

Q. Do you remember at all, sir?

A. Yes; I know the boy and I know that over the past 15 years he has been in our employ at different times; and I assume, a check having been drawn to him, that he was in our employ at that time.

Q. Well, all right. Will you tell me now what check No. 3582 represents? A. In the same month?

[1294]

Q. No. That was in September.

A. September what date?

Q. September 12th, sir.

A. September 12th, and the check was 3570; is that the check number?

Q. No, sir; the check is 3582.

A. And September, 1944?

(Testimony of Wayne W. Dailard)

Q. Yes, sir.

A. I think that must be incorrect. The only check number I have, drawn on September 12, 1944, to Fred Heightfeld is check No. 3510.

Q. All right. Will you from your records tell us, then, what check 3582 does represent, sir?

A. Drawn on September 12th?

Q. Irrespective of the date, will you tell me what Check 3582 represents?

A. In the month of September?

Q. Well, irrespective of the month, will you tell me?

A. Well, I will tell you if I can find it, Mr. Christensen. I am not an auditor, you know. I have one here for \$157.66, but it looks like Bushes—no. Well, I can't even read who this is to. If you can—

Q. Is it Beach Cafe? A. Beach Cafe, righto.

Q. What is that for, sir? [1295]

A. I have no idea. That was a concessionaire of ours. It could have been a refund or an adjustment of contract. It could have been many things.

Q. Can you help me with check No. 3939? That was in November of 1944.

A. Do you have a date on that, Mr. Christensen?

Q. Yes, sir; I have November 27, 1944.

A. That is made to Axtel Shibstey, a contractor.

Q. It is what, sir? A. A contractor.

Q. What was that for, do you know?

A. Well, I assume for some repairs or maintenance, as I know the gentleman well and I know he has also served us over a period of 10 or 12 years.

(Testimony of Wayne W. Dailard)

Q. Isn't there a memorandum there that that is for supplies, ballroom?

A. I don't see a memorandum here; no.

Q. Have you any record—

A. I think it says here "expense"—no, it doesn't. There is no identification of it here.

Q. Is there any place there where you would have any other reference to that check from those books so as to tell what it was for, sir?

A. Not that I know of; no. I think the only thing that would support this in our bookkeeping would be the vouchers [1296] and the paid invoices.

Q. Well, let us pass that for the moment and let us turn to Check No. 3953. A. 3953?

Q. Yes, sir.

A. To Pacific Square for \$250.00.

Q. That is from the Mission Beach ballroom to Pacific Square, is that right? A. Yes.

Q. What is that for?

A. Well, it could have been on a combination ad, where a portion of it was allocated to Mission Beach; it could have been on a billboard contract, some item which we frequently did, between the two operations, was to make a purchase by one and allocate the expense to the other. I notice this item is advertising. That is why I assume that it might be for radio; it might have been a radio contract, radio time, wherein we mention both operations and attempted to divide the proportionate share where it belonged.

(Testimony of Wayne W. Dailard)

Q. I notice a large number of the checks are made to the Beach Amusement Enterprises. Was there any practice in making out checks to yourself?

A. Oh, on obtaining change for the ballroom, many times it was handled in that way. If they needed three or four thousand dollars change for a weekend, that is common [1297] practice.

Q. Except for those large amounts would there be any reason that you can think of for—

A. Mr. Christensen, I told you I am not an auditor. If there is anything wrong with these books, I would like to know it. We will attempt to get any evidence that you want, but don't ask me things I can't answer, because I am not a bookkeeper and I am not an auditor.

Q. In spite of that, can you still tell me why a lot of checks were made to Beach Amusement Enterprises in amounts smaller than the couple of thousand dollars?

A. I assume there is some regular practice that brought it about. I can't offhand tell you; no. I know one thing: It is the practice that we draw checks to Pacific Square, Ltd., an operation I am much more familiar with, for our weekly change fund, because we clean out our safes on the weekend, and on Monday morning we make a check for three or four or five or ten thousand dollars, whatever is required for the change fund during the week. I have signed many of those. I assume the same practice was used in this operation.

Q. Let us take one or two of them and then you tell me if that would help you. Let us take Check No. 2406. Now, I have picked a small amount. A. 2406?

(Testimony of Wayne W. Dailard)

Q. Yes, sir. [1298]

A. In what year and what month?

Q. That was February 14 of 1944, and it is a small amount, and see if that will help you.

The Court: I think I should ask counsel for plaintiff what relevancy would that have to this case.

Mr. Christensen: I would like to know what some of these items of expense are which are charged up against his income as operating expenses, what items went into them.

The Court: What difference would that make in February of 1944 to this case?

Mr. Christensen: All right. I happened to pick one that is back quite a ways for illustration. Let us pick some others.

The Court: Any that are contemporaneous with the situation in San Diego with respect to this lease.

Mr. Christensen: All right.

The Court: Might be material, but I do not see how others that are anterior to any solicitation for bids or invitations for bids or bidding or acceptance of bids would be material. We are not trying an income tax case; we are trying this case.

Mr. Christensen: No. I will confine it now to a later period.

Q. Let us take, then, for illustration, check No. 3949, which was drawn on December 4th of 1944. [1299]

A. Well, that looks to me like it says some kinds of band expense. The amount is \$2,800, drawn on the 9th —no; drawn on the 4th.

(Testimony of Wayne W. Dailard)

Q. Isn't that just \$28.00, sir?

A. Yes. I beg your pardon. You are right.

Q. Does that help you now to tell me what that was for?

A. No. I have no idea, Mr. Christensen. The vouchers would clarify all those. If you would have asked for the vouchers, you could have had them.

Q. I notice that exactly one week later there is another check made to the Beach Amusement Enterprises in exactly the same amount, \$28.00, as represented by Check No. 3964. Would that help you to tell me what that is for?

A. No; it wouldn't help me a bit, sir.

Q. All right. I notice exactly one week thereafter there was another check in the same amount drawn to Beach Amusement Enterprises and represented by Check No. 3973; that is for the amount of \$28.00. Yes; there are three of them in a row. Would that help you any?

A. No.

Q. Let us take one week thereafter, December 26th, 1944, Check drawn to Beach Amusement Enterprises for \$28.00, represented by Check 4001. Would that help you?

A. No, sir. [1300]

Q. By Mr. Christensen: Check No. 3860, drawn to Music Corporation of America, on November 19, in the amount of \$725.00. What is that for?

A. Without looking at the check, I would say it is probably a deposit on a band.

Q. Well, did you make deposits on bands, sir?

A. Frequently, yes.

(Testimony of Wayne W. Dailard)

Q. Is that true of all of your checks drawn to Music Corporation of America, sir?

A. It could be for a deposit on a band; it could be for the completion on the percentage of the band's earnings; it could be for advertising material.

Q. You would have no independent memory as to what any of these checks to Music Corporation of America were for?

A. No. I only know that when we draw a check to Music Corporation of America it has got to represent either salaries, advances, or advertising costs. [1301]

Q. What kind of salaries are you talking about?

A. Band salaries.

Q. Well, don't you pay that to the band?

A. Not always.

Q. You pay it to the Music Corporation of America?

A. Occasionally.

Q. And they, in turn, pay the members of the—

A. That's right, sir.

Mr. Christensen: That is all I wanted to ask, sir.
Thank you.

Redirect Examination

By Mr. Doherty:

Q. Mr. Dailard, this Exhibit P which you have been testifying from is headed, "Beach Amusement Enterprises"?

A. That is the company, the partnership that had the lease and operated Mission Beach.

(Testimony of Wayne W. Dailard)

Q. That is the name under which it was operated?

A. That is our company name, yes.

Q. Down at the bottom is a statement which shows, "Net profit for 1944 for Beach Amusement Enterprises, \$80,364.73"? A. That is correct, sir.

Q. Was that amount reported to the federal government, the Internal Revenue Department?

A. Yes, sir. [1302]

Q. And was that amount upon which you paid taxes?

A. That is correct, sir.

Mr. Doherty: That is all.

Are you through now with the books?

Mr. Christensen: Yes. You may take them with you, Mr. Dailard, and thank you for helping us.

The Court: The defendant rests?

Mr. Doherty: The defendant now rests, your Honor.

The Court: Have you any rebuttal, Mr. Christensen?

Mr. Christensen: Yes.

The Court: If you have, I think we will defer it until this afternoon.

Mr. Christensen: Yes, I have some rebuttal, your Honor.

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same day.) [1303]

Los Angeles, California, Monday, February 11, 1945.
2 P. M.

The Court: All Present. Proceed.

Mr. Christensen: Mr. Desser, please.

ARTHUR A. DESSER,

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Arthur A. Desser, D-e-s-s-e-r.

By Mr. Christensen:

Q. Mr. Desser, your business, occupation or profession sir, is what? A. I am an attorney.

Q. Admitted to practice in all the courts of the State of California? A. I am, sir.

Q. You have been now for what period, sir?

A. Fifteen years.

Q. You are a member of the law firm of Desser, Rau & Christensen? A. I am, sir.

Q. You know Mr. Joe Ross, do you, sir?

A. Very well. [1304]

Q. Did you have a conversation with him on or about February 15th of last year, sir? A. I did.

Q. Was that conversation a personal conversation at his office, or was it by telephone?

A. I had had a personal conversation with him in his office on February 15th, but prior to that time I had several conversations with him.

Q. Do you recall the occasion when you first telephoned him, sir? A. That was February 2nd.

(Testimony of Arthur A. Desser)

Q. Did that conversation pertain to Finley or Mission Beach Amusement Center? A. It did, sir.

Q. Do you recall what was said on that occasion?

A. I called him and told him that we represented Finley, that Finley had been the successful bidder in obtaining the Mission Beach Amusement Center and Ballroom, that he was having a great deal of difficulty in obtaining bands, and there seemed to be some kind of a deal between the persons—the person or persons who had the ballroom previous to the time Finley had it and Music Corporation of America, and I called him because I knew he represented the Music Corporation. I told him—

Mr. Doherty: May I interrupt, your Honor? I object on [1305] the ground it is not proper rebuttal. It is part of the plaintiffs' main case, which they went into rather completely with Mr. Finley.

Mr. Christensen: It is offered in contradiction of the conversation which has been related here by Mr. Ross.

The Court: I think there may be a portion of it that may be rebuttal. That is what I was just looking for in the transcript, and you ought to use the transcript rather than to ask for a narrative in this omnibus character, because some of it will not be rebuttal. There is some that would be rebuttal, and that "some" occurred when Mr. Ross was on the stand.

Mr. Christensen: Yes, your Honor.

The Court: You have a transcript of this evidence, and it would be readily ascertained what would be rebuttal and what would not be rebuttal. Objection sustained.

(Testimony of Arthur A. Desser)

Q. By Mr. Christensen: Will you now state who was present at the time that you had the conversation with Mr. Ross in his office?

A. Mr. Ross, Mr. Finley and myself.

Q. Was that on or about February 15th of 1945, sir?

A. It was.

Q. Will you please relate the conversation?

A. I introduced Finley to Mr. Ross, and then Finley explained to him what was happening in connection with obtaining music for Mission Beach, and told him that he was suspicious [1306] of a deal between Bishop and Dailard. Ross said that could very well be true, that he did not trust Dailard and he had no confidence in Bishop. He said that Dailard had recently—putting it in his words—stolen some money from the—

Mr. Doherty: Just a moment. I object, your Honor, that that is a collateral issue.

Mr. Christensen: May I suggest that this is a matter for which the foundation was laid, as will be disclosed by an inspection of page 1229 and 1230 of the transcript, sir.

Mr. Doherty: You cannot impeach on a collateral issue.

The Court: Will you read the question, Miss Reporter?

(The record was read.)

The Court: Just a moment. That is collateral, that last statement. Nothing of that kind was elicited when Mr. Ross was on the stand. I mean as to the part he had just proceeded to relate. What he had related theretofore is rebuttal. This last part is a collateral matter and was not asked of Mr. Ross either.

(Testimony of Arthur A. Desser)

Mr. Christensen: May I invite the court's attention to line 24 on page 1229?

The Court: Read that again, Miss Reporter, please, the last portion of the answer?

(The portion referred to was read.)

The Court: Objection sustained.

Mr. Doherty: Will the jury be instructed to disregard it? [1307]

The Court: As to that last statement, ladies and gentlemen, you are instructed to disregard it and leave it out of consideration in the case. The rest of the answer that is given by the witness to the question will stand.

Mr. Christensen: Is the basis of it being collateral, your Honor?

The Court: Collateral and not rebuttal. There was nothing specifically like that. There was no specific matter such as this contained in the interrogation of this witness propounded or submitted to the other witness, Ross.

Mr. Christensen: Then it—

The Court: Do not argue it.

Q. By Mr. Christensen: Did Mr. Ross say that there was something with reference to finances which had occurred while Mr. Dailard was connected with Collonades in his management of Casino Gardens?

A. He did, sir.

Mr. Doherty: I object, your Honor, as not proper rebuttal, and especially, it is an attempt to impeach a witness on a collateral matter.

The Court: Overruled.

(Testimony of Arthur A. Desser)

Q. By Mr. Christensen: Your answer?

A. He did, sir.

Q. Did Mr. Ross say he was going to sue him, Dailard?

A. He said he was pressing a claim against Dailard.
[1308]

Q. Subsequently did you become attorney for the Collonades? A. I did, sir.

Q. Did you take action against Mr. Dailard on account of the matter?

Mr. Doherty: Just a moment. I object on the ground it is not proper rebuttal; incompetent, irrelevant and immaterial, and outside the issues of the case.

The Court: Sustained.

Q. By Mr. Christensen: You received the file from Mr. Ross pertaining to Collonades, did you, sir?

A. I did, sir.

Q. And you did take action against Mr. Dailard?

Mr. Doherty: The same objection.

The Court: The same ruling. Sustained.

Mr. Christensen: Very well. You may examine, sir.

Cross Examination

By Mr. Warne:

Q. Mr. Desser, you represent the San Diego Journal, —is that the name of the paper? A. I do, sir.

Q. And you represent Mr. McKinnon?

A. I do, sir.

Q. You have an interest in this law suit?

A. No, sir. [1309]

Q. What? A. No, sir.

(Testimony of Arthur A. Desser)

Q. You do not? You drew the pleadings in the first instance in this case, did you not?

A. My office drew them, sir.

Q. Well, you signed the pleadings, did you not, as the attorney of record? A. I probably did.

Mr. Warne: May I see the original file?

Mr. Christensen: I will stipulate he did, Mr. Warne.

Mr. Warne: You will stipulate that only Mr. Desser signed the complaint on behalf of your firm?

Mr. Christensen: That it is signed, "Desser, Rau & Christensen, by Arthur A. Desser," as attorneys for the plaintiff.

Mr. Warne: That the only individual appearing is Mr. Desser, as the attorney in that instance?

Mr. Christensen: Well, I think my statement there is—

Mr. Warne: Very well. I will take it.

Q. By Mr. Warne: Also, you signed the amended complaint, as the attorney for the plaintiff in this case, which was filed here the other day; do you remember that? A. Yes, sir.

Q. You are familiar with the rules of this court, are you not, particularly Rule XI of the rules of this court being [1310] the Federal Rules of Civil Procedure?

Mr. Christensen: To which we object as being immaterial to any issue here presented.

Mr. Warne: It will become material.

The Court: It may be preliminary. Overruled.

Q. By Mr. Warne: This provision, particularly with reference to the signing of pleadings, is:

"That the signature of an attorney constitutes a certificate by him that he has read the pleadings, that to the

(Testimony of Arthur A. Desser)

best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay."

You are familiar with that rule?

Mr. Christensen: To which we object as being immaterial.

The Court: Overruled.

Mr. Warne: Whether he knows about it?

The Witness: Yes.

Q. By Mr. Warne: Did you at the time that you filed the complaint in this action, the original complaint, know that Mr. Finley had not suffered any damage whatever at that time?

Mr. Christensen: To which we object as being immaterial to any issue here and not proper cross examination.

The Court: Overruled.

The Witness: A. I don't believe that that is a statement [1311] of fact, Mr. Warne.

Q. By Mr. Warne: Well, I am asking you whether you knew that to be a fact.

A. I don't believe that is a fact, Mr. Warne.

Q. Did you know, at the time that you signed the amended complaint, which was filed here about two days ago in this court, that Mr. Finley had testified that at the time that he filed the original complaint he had not suffered any damage?

Mr. Christensen: To which we object as calling for a conclusion and opinion. Furthermore, that is not Mr. Finley's testimony on the witness stand here. Also, as being immaterial and not proper cross examination.

(Testimony of Arthur A. Desser)

The Court: Read the objection, please, Miss Reporter.
(The objection was read.)

The Court: Without indicating what was Mr. Finley's testimony, or what was not his testimony, the objection is overruled.

Q. By Mr. Warne: Will you answer the question, please?

A. Would you mind reading the question, please?
(The question was read.)

A. I think that is wishful thinking on your part, Mr. Warne.

The Court: No, that is not an answer to his question.

The Witness: A. I don't believe that to be a fact, Mr. [1312] Warne.

Q. By Mr. Warne: You do not believe that he so testified, or you didn't know about it?

A. I don't believe that he had not suffered any damage, Mr. Warne.

Mr. Warne: I did not ask that question. If I may be permitted, I would like to press the question.

The Court: Don't catechise the witness in any way. You propounded your questions to him, and he will answer them.

Mr. Warne: Thank you.

The Court: What is the question?

Q. By Mr. Warne: Mr. Desser,—

Mr. Christensen: Will you read the question, Miss Reporter?

Mr. Warne: There is no pending question.

Mr. Christensen: I am sorry.

Q. By Mr. Warne: Mr. Desser, I asked you the question of whether or not, when you filed the amended

(Testimony of Arthur A. Desser)

complaint, or signed the amended complaint the other day, you knew that Mr. Finley had testified in this action to this effect,—

Mr. Christensen: What page are you reading from?

Q. By Mr. Warne: (Continuing)—and I am reading now from page 745 of the transcript, the reporter's transcript in this case:

“Q. Respecting your damages in this case, I will [1313] direct”—and these are questions propounded to Mr. Finley on the stand in his own behalf—“Respecting your damages in this case, I will direct your attention to this one statement in your deposition, turning to page 189, beginning at line 16. This is the deposition taken upon October 8, 1945, of Larry Finley, in which you were represented by Mr. Rau.

“The Witness: Rau.

“Q. Rau, and the defendants were represented by Mr. Clore Warne; and I will ask you if these were not the questions and answers at that time—189, beginning at line 16:

“‘Q. By Mr. Warne: First, have you estimated that in any fixed number of dollars up to this time?’ Now, Mr. Warne previously had been asking about damages.”

Mr. Doherty is doing the questioning here.

“‘A. No; I haven't.

“‘Q. Did you at the time you brought this law suit, did you at that time compute the damages which you had suffered at that time? Answer yes or no.

“‘A. At that time I had no damages as yet. I could see damages coming.’”

Did you know he had so testified in this trial? [1314]

(Testimony of Arthur A. Desser)

Mr. Christensen: Just a moment. To which we object, that he has not so testified to those things. He was simply asked—

The Court: Let me see the page, please.

Mr. Warne: 745, your Honor.

The Court: Now, read the full question, please, Miss Reporter.

(The record was read.)

The Court: The question is too involved, Mr. Warne.

Mr. Warne: I agree, your Honor. May I withdraw it?

The Court: Yes.

Mr. Warne: Thank you. May I present this to the witness and ask him to read it.

Q. By Mr. Warne: I invite your attention, Mr. Desser, to the reporter's transcript in this case, commencing on page 745, at line 9, and ask you to read it, please, from there to and through line 3 on page 746.

A. I have read it.

Q. Did you know that Mr. Finley had so testified in the trial of this action at the time this amended complaint was filed?

The Court: The way that is phrased, that is also ambiguous. It is to me. I don't know. If the witness can answer, he should do so. Read it, and we will see if you have it the way you want it. I think I know what you have [1315] in mind, but whether your phraseology contains it, I don't know. I suggest we have it read so that you will be able to confirm it yourself.

Mr. Warne: Thank you. Would you read it, please?

(The question was read.)

(Testimony of Arthur A. Desser)

Mr. Warne: May I withdraw that and rephrase the question?

The Court: Yes.

Q. By Mr. Warne: Did you know those proceedings had been had and Mr. Finley had answered the questions as they were propounded to him upon the trial of this case?

A. I imagine he answered the questions as they were propounded, but I did not follow the daily testimony nor did I know what his answers were to each and every question.

Q. Did you know, in substance and effect, that he had said at the time you filed the amended complaint in this action that he had not suffered any damage?

A. I think that is a pleading of record.

Q. Did you know that fact?

A. Well, that is one of those questions like, "Have you quit beating your wife?"

Q. Is that the best answer you can give?

A. I think you are making a great play on words, Mr. Warne.

Q. Is that your answer? [1316]

A. I think that is the answer to your question, Mr. Warne.

Q. Well, let me ask you this, whether you did or did not know that fact, you signed the amended complaint here?

Mr. Christensen: I will so stipulate, Mr. Warne.

Q. By Mr. Warne: Is that correct? Is that your signature? A. Yes, that is my signature.

(Testimony of Arthur A. Desser)

Q. And that was presented to the court some days after the proceedings of Tuesday, February 5th, from which you have just read from the transcript; is that correct? A. I don't know the exact date.

Mr. Warne: You don't know. I see. You will stipulate it was filed thereafter?

Mr. Christensen: Whatever the date shows on there, Mr. Warne.

Mr. Warne: On the 6th day of February, it was, sir.

Mr. Christensen: If that is the date, yes, sir.

Q. By Mr. Warne: Now, of course, you read this complaint before you signed it, Mr. Desser?

A. Frankly, Mr. Warne, I believe that was prepared by one of my partners and it was presented to me for signature, and I am not in the habit of reading everything that they prepare. I assumed they knew what they were doing.

Q. In other words, in a law suit of this kind, where [1317] the rules, as I have read them to you, require you to certify that you have read it, you didn't read it; is that it?

A. Mr. Warne, I will be governed by whatever one of my partners said was correct.

Q. I am asking you about the fact. I am not asking you about the conditions.

Mr. Christensen: I object.

Mr. Warne: May I withdraw that, your Honor?

The Court: Yes. Don't get into any argument now. There are two lawyers here, remember, one on the stand and one examining the witness.

The Witness: If you will permit me to read it, I will determine whether I read it before signing it, but my

(Testimony of Arthur A. Desser)

offhand impression would be it was something presented by one of my partners for signature, and I believed he know what he was doing.

Q. By Mr. Warne: Well, did you mean to say or represent, in signing this pleading,—

A. It is an amended pleading.

Q. Yes, the amended complaint, Mr. Desser, this is the amended complaint,—did you mean at that time to say “that the plaintiffs had been damaged in the sum of \$1,000,000.00?”

A. I meant to say this, and if you will permit me to read it to the jury, you have asked me the question—

Q. You meant to say what? First, I will withdraw that [1318] question. Did you read it before you signed it, first? A. I meant to say—

Q. No. I am sorry to interrupt.

A. You have asked a question.

The Court: Just a moment, gentlemen. Just a moment.

Mr. Warne: I am sorry.

The Court: I have had so much experience with my brother lawyers as witnesses, I think I should interpose here to direct both of your attention to the fact that one is the witness and the other is the lawyer questioning. Now, conduct yourselves accordingly.

The Witness: Is there a question pending?

Q. By Mr. Warne: I will ask you to read paragraph VIII of the pleading, and I will propound a question; that is, of the amended complaint.

A. “As a result of”—

(Testimony of Arthur A. Desser)

Q. Just a moment. Read it to yourself, if you please.

Mr. Christensen: Paragraph VIII, Mr. Warne?

Mr. Warne: Correct.

The Witness: I have read it.

Q. By Mr. Warne: You have read paragraph VIII?

A. I have.

Q. Did you read this pleading, of this amended complaint, prior to the time that you signed it last week?

A. Yes, sir. [1319]

Q. Now, then, did you read paragraph IX?

A. Yes, sir.

Q. Paragraph IX recites—

Mr. Christensen: To which we object as not being proper cross examination.

Mr. Warne: I believe it will be, your Honor.

The Court: He said that he read paragraph IX, and paragraph IX is among the files of the court.

Mr. Warne: Correct.

The Court: Now, if that is an introductory to an interrogation,—

Mr. Warne: It is. I am not reading it to the jury.

The Court: All right.

Q. By Mr. Warne: You read at that time these words, and you have read just now these words, quoting from paragraph IX, "Plaintiffs"—

Mr. Christensen: To which we object as not being cross examination, your Honor. Your Honor has before you—

The Court: No, I haven't. The original file is not here.

Mr. Warne: May I hand it back?

(Testimony of Arthur A. Desser)

The Court: Paragraph IX is the subject-matter of the question, is it, Mr. Warne?

Mr. Warne: Yes, correct, your Honor.

The Court: That brings up the question, gentlemen, that [1320] is involved in the instructions, proposed instructions. I was going to interrogate counsel for each side on the question as to whether either of counsel thought that the subject-matter of paragraph IX of the amended complaint in this case was a jury matter.

Mr. Christensen: I was of the opinion that it would be for the court.

Mr. Warne: Of course, that wasn't the purpose of this question.

The Court: I know, but it is involved in the question; very much involved in the question. If it is your opinion, and if you are going to request that an instruction to the jury embody elements that are contained in paragraph IX of the amended complaint, I want to know it now.

Mr. Warner: Very frankly, my own position is that we have not discussed that at the moment. I have some personal views on it, in the state of the record as it is at the moment.

The Court: I shall not permit the question until the court is appraised of the position of both sides of this case on that subject, because if it is not a question that is a jury question, a factual question with the jury, then it would be prejudicial, in my judgment, to permit you to read it.

Mr. Warne: Without argument, may I suggest the basis on which I felt it would be proper? [1321]

(Testimony of Arthur A. Desser)

The Court: I don't know but what then it would be necessary for you to state in argument something that the court considers at this time would be prejudicial.

Mr. Warne: My whole purpose—

The Court: If you will come up to the bench, maybe I can explain what I mean.

(The following proceedings were had outside the hearing of the jury:)

Mr. Warne: My purpose is solely to show the interest of the witness in the outcome of the law suit.

The Court: You have a right to show that, but you should show it, I think, by generalized questions. If that is not a jury question or a proper subject-matter of inquiry before the jury, and you read that they are asking for \$100,000.00 in attorneys' fees, in my judgment, it would be highly prejudicial to do so, because they could ask for a million dollars if it is not a jury question and it would not make any difference what they asked for, because the court would pass on the question and the court would assess whatever the attorneys' fees might be.

Mr. Warne: My point is that the fact they are looking to the court or to the outcome of the law suit for any attorneys' fees is material.

The Court: It certainly is, as showing the interest of the witness on cross examination. [1322]

Mr. Warne: That is right.

The Court: To show that in this character of an action the law not only permits a recovery for damages, but if damages are recovered permits an allowance of reasonable attorneys' fees to the attorneys who prosecuted the

case. You have a right to propound a question of that kind, but not to read a figure which, in my judgment, would be extremely prejudicial, unless you have law to support the fact that the jury has the right to pass upon the question of attorneys' fees, which I don't think they have.

Mr. Collins: I don't know that there is any adjudication on it that way, that it is a jury question.

The Court: I don't believe it is. I think it is the same as any other question of attorneys' fees, unless the statute says that that issue can be submitted to the jury.

Mr. Collins: I can't recall anything of that kind.

The Court: In other words, how could a layman fix the attorneys' fees? True, if a lawyer is suing in the civil courts for a reasonable fee, then if he wants a jury to pass upon the question, the jury can hear the testimony pro and con and fix the fee. I don't know. I am just putting the question up to you because I want to know because it will be a vital matter in dealing with the instructions.

Mr. Collins: May I inquire this? They have a comparable provision in the Fair Labor Standards Act, and I don't [1323] recall. I tried some of those cases, but not before a jury. What is your Honor's experience?

The Court: I have tried them before the court, not with a jury. I think you can cover the point you have in mind without disclosing the amount that is asked for. That is the point that I think would be prejudicial.

Mr. Warne: Very well.

Mr. Christensen: Isn't that matter covered in—I have forgotten the name of the case, the same case in 140 Fed. (2d)—the case on damages?

Mr. Jaffe: The Bigelow case.

(Testimony of Arthur A. Desser)

Mr. Christensen: That is it. That sets forth the jury shall fix the compensation and the court is to fix the attorneys' fees.

The Court: What was that case?

Mr. Jaffe: The Bigelow case.

Mr. Warne: Very well. I will withdraw the question.

(Thereupon the proceedings were resumed within the hearing of the jury:)

By Mr. Warne:

Q. I will withdraw the pending question, and ask you this: at the time that you instituted this law suit, you knew the fact to be, did you not, that under a prosecution of this kind the plaintiffs might seek and there might be awarded to the plaintiffs attorneys' fees for prosecuting the [1324] action; is that correct?

The Witness: Am I permitted to answer that?

The Court: Yes.

The Witness: A. Yes, I knew that.

Q. By Mr. Warne: And in the complaint which you filed, the original complaint which was filed, you made a request that there be paid to the plaintiff, as it then was, Larry Finley, an amount of attorneys' fees for the services of yourself and your firm, Desser, Rau & Christensen, in the prosecution of the complaint in this action?

A. That's right, except this, that the award—

Q. I just asked you—

A. I haven't finished my answer.

Q. —what was in the complaint.

A. I haven't finished my answer.

(Testimony of Arthur A. Desser)

The Court: You are a witness now, remember, and not a lawyer. You have answered the question.

Q. By Mr. Warne: And when you filed and signed the amended complaint, paragraph IX of the amended complaint, which you say you read the other day, you again made claim and asserted that you wanted allowed to the plaintiffs, that is, Mr. and Mrs. Finley, an amount to compensate you and your firm as attorneys for the prosecution of this action; is that correct?

A. We requested that an award be made to the plaintiff [1325] to compensate him, to reimburse him, I should say, for the expenses that he would be put to in prosecuting this action, yes, sir.

Q. Is that the language that you used in the complaint which you signed?

Mr. Christensen: To which we object as not the best evidence.

Mr. Warne: I will read it, then, if the court please.

Mr. Christensen: To which we object as immaterial and not proper cross examination.

Mr. Warne: If the court please, I submit, and I will not argue it, I submit it is proper at this stage, in view of the witness' answer, to read the paragraph.

The Court: Read the last two or three questions and answers, Miss Reporter, please.

(The record was read.)

The Court: Objection overruled.

Mr. Warne: I am reading, if the court please, paragraph IX of the amended complaint:

"Plaintiffs, in order to enforce their rights against the defendants, have employed the services of Messrs. Desser,

(Testimony of Arthur A. Desser)

Rau & Christensen, a firm of attorneys in the city of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the District [1326] Courts of the United States, and under the laws of the United States, to-wit, Section 7 of the Sherman Act, plaintiffs are entitled to recover from the defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of \$100,000.00."

No further questions.

Mr. Christensen: I have no further questions. Thank you. You may step down.

Mr. Mirken, please.

LAWRENCE MIRKEN,

called as a witness by and on behalf of the plaintiffs, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Lawrence Mirken, M-i-r-k-e-n.

By Mr. Christensen:

Q. Mr. Mirken, your business, occupation or profession is what, sir?

A. I am an attorney by profession. At the present time I am connected with Fox-West Coast Theatres.

Q. You formerly were employed by Mr. Finley, were you not?

A. I was associated with Mr. Finley, yes. [1327]

Q. That was with reference to the Trianon Ballroom, I believe, down at San Diego? A. Yes, sir.

(Testimony of Lawrence Mirken)

Q. Were you present on November 8th of 1944, which is the date the bid was let to Mr. Finley, and in the evening, at a time when Mr. Bishop and Mr. Howard and Mr. Finley were present and had a conversation?

A. I was.

Q. Do you recall that conversation now, sir?

A. I do.

Q. Will you please relate it?

A. Do you want the immediate conversation at which Mr. Bishop was present, or do you want the incident as it occurred?

Q. Well, perhaps for the continuity tell us the incident, as it occurred.

Mr. Doherty: Object on the ground it is not proper rebuttal, if it is going to be a broad cast question.

The Court: Sustained as too broad.

The Witness: I will answer the question directly, then.

Q. By Mr. Christensen: Please answer the question, sir.

A. On that date Mr. Bishop came up to the Trianon Ballroom. He had been preceded a short while before by Mr. Howard. At the time Mr. Bishop appeared in the ballroom, [1328] Mr. Howard was in the office talking to Mr. Finley. I recognize Mr. Bishop from having seen him that morning at the opening of bids in the City Council chambers of the City of San Diego, at which Mr. Finley had been awarded the Mission Beach Park lease. I went over to Mr. Bishop, and I told him that Mr. Howard and Mr. Finley were in the office, and that I would take him in to them. I went into the office with Mr. Bishop.

As I recall the conversation that took place, Mr. Bishop put out his hand, I believe, to shake hands with Mr. Fin-

(Testimony of Lawrence Mirken)

ley, and Mr. Finley said, "I don't want to talk to you," he said "anybody that would pull anything as low as what you did, I don't want the best part of." That was the general gist of the conversation.

Mr. Bishop said, "Well, I don't think I did anything I shouldn't have done."

And Mr. Finley said, "You did, in my opinion, the lowest thing that I have ever experienced." And Mr. Bishop said, "Well, I have got a right to do anything." He said, "Pacific Square is one of my best clients, and I have a right to do anything I want to do or see fit to do to protect Pacific Square."

Then there was some further conversation, and relative to the band situation, Mr. Bishop said, "Well, maybe we can get together to do some business." And Mr. Finley said, [1329] "If I have to do business with you personally, I would rather play phonograph records."

Then, as I recall,—there was a very bitter atmosphere around the entire conversation, because Mr. Finley didn't want to talk to Mr. Bishop originally. Mr. Howard had preceded him, and I tried to soften him up before Mr. Bishop got there. I had told Mr. Howard when he went in that Mr. Finley was not in a receptive mood to talk to Mr. Bishop. As he walked out—

Q. As he walked out. Who?

A. As Mr. Bishop walked out of the room, he said,—I am trying to think of the exact words he used because it impressed itself upon my mind at the time—

Q. Take your time.

A. I believe he said—oh, I remember now what happened. Mr. Bishop said to— Mr. Finley said to Mr.

(Testimony of Lawrence Mirken)

Bishop— before this conversation ended Mr. Finley said to Mr. Bishop, "Just what did you come here for?" And Mr. Bishop said, "Well, I will tell you," he said, "I came to make a deal with you to protect the Square."

That, as far as I recall, was the end of the conversation. Mr. Finley got up, we all got up and walked out of the room, and Mr. Bishop walked down the stairs. And Mr. Howard came up to me and sort of patted me on the arm and said, "We will smooth this thing over." And that is all I recall. [1330]

Mr. Christensen: You may examine, Mr. Doherty.

Cross Examination

By Mr. Doherty:

Q. Mr. Mirken, you were present in the City Council chambers on the morning of November 8th—

A. I was.

Q. — when the bid was awarded to Mr. Finley?

A. I was.

Q. And when did you go to the Trianon Ballroom that evening?

A. I believe I went to the Trianon Ballroom at the opening, which was about 7:00 or 7:30.

Q. Did you go there alone?

A. I do not recall whether I went alone or with Mr. Finley, or whether Mr. Finley joined me later. We frequently had dinner together and went to the ballroom together, and sometimes I had dinner myself and then Mr. Finley came up later.

Q. You were Mr. Finley's attorney, were you, in the matter before the—

A. No, I was not.

(Testimony of Lawrence Mirken)

Q. You just happened to go over to the City Council as a coincidence?

A. No. I had come along out from New York with Mr. Finley to act as assistant and advisor to him on other matters, [1331] and while I was in San Diego the Beach project came up, and I assisted Mr. Finley in preparing the bid which was subsequently submitted to the Council, such as the proof reading, and some of the material that was inserted, and things like that.

Q. Do you have your office in San Diego now?

A. No, I am not practicing law. I am not admitted in California. I am admitted in the State of New York.

Q. You do not practice law in California?

A. No, I do not.

Q. You met Mr. Finley in New York or on the train on the way out?

A. No, I have known Mr. Finley for a great many years, and I met him in New York before I came out.

Q. How many years have you known Mr. Finley?

A. Well, I would say at least twenty.

Q. How old are you now? A. I am thirty-eight.

Q. Since you were eighteen, and he was—

A. Well, I was younger, as a matter of fact. I met Mr. Finley in my freshman year in college. I think I was about sixteen and a half at the time.

Q. Did you go to school in Syracuse?

A. Yes, I did.

Q. Did you meet him in New York by appointment or [1332] accident?

A. No, I met him in New York—I saw him frequently on his visits to New York. When he came to New York to stay a while, I associated with him quite a bit.

(Testimony of Lawrence Mirken)

Q. Did you come west on the train with him?

A. No, he preceded me by about two weeks. I came later with my wife, and his wife and child.

Q. And you went down to San Diego together?

A. That's right.

Q. At that time he told you he was bidding for the so-called Mission Beach matter?

A. At that time I don't think the Mission Beach matter was even in question. We were interested at that time in a radio station.

Q. That is, the application for a radio station?

A. The application for a radio station, yes.

Q. Did you say you helped him prepare the bid for the City Council?

A. To a certain extent, yes.

Q. Would you recognize it if I showed it to you?

A. I think I would.

Q. This is Exhibit No. 8 (handing document to witness). A. This is it.

Q. Had you known Mr. Finley continuously during the twenty years? [1333] A. Yes.

Q. And you kept in contact with him during all of that time?

A. I would say perhaps once or twice a year.

Q. Once or twice a year. A. Yes.

Q. You knew him when he was a salesman for a jewelry firm up in New York State?

A. Yes, I knew him when he first started in the jewelry business.

Q. You knew him when he was in a jewelry store here in Los Angeles? A. I did.

(Testimony of Lawrence Mirken)

Mr. Christensen: That is objected to as immaterial and not proper cross examination.

The Court: Overruled.

Q. By Mr. Doherty: Did you know him when he worked for the jewelry store in Santa Monica?

A. I wouldn't recall whether he had or not. I was in New York all the time, and the times I saw Mr. Finley was the times he came to New York, or he wrote to me.

Q. You knew him when he was in the jewelry business in Burbank and North Hollywood? A. Yes.

Q. You read this application of Mr. Finley before he [1334] filed it, did you? A. I did.

Mr. Christensen: That is objected to as being not proper cross examination, your Honor.

The Court: It has been answered. I mean that question has been answered.

Mr. Christensen: Yes, I will not—

The Court: There is nothing before the court.

Q. By Mr. Doherty: Were you connected with Mr. Finley in the watch venture in New York?

Mr. Christensen: Objected to as being immaterial and not proper cross examination.

The Court: Sustained.

Q. By Mr. Doherty: Now, that evening, November 8, 1944, you and Mr. Finley had dinner together?

A. I didn't say that.

Q. Or you went to the ballroom together?

A. I said I don't recall whether I preceded him to the ballroom or whether we had dinner together.

Q. Anyhow, you met at the ballroom?

A. Yes, he was there.

(Testimony of Lawrence Mirken)

Q. At the Trianon? A. That's right, sir.

Q. And you both went into the office together, or you were in the office together? [1335]

A. No, Mr. Finley was at the far end of the hall, and Mr. Howard came into the Trianon. I was standing near the stairway, which is the entrance to the ballroom. It is on the second floor.

Q. Yes.

A. Mr. Howard was referred to me, and he told me that Mr. Bishop was coming down shortly, he would like to talk to Mr. Finley.

Q. Who told you who Mr. Howard was?

A. Mr. Howard introduced himself to me at that time.

Q. Who referred Mr. Howard to you?

A. One of our doormen. He asked for Mr. Finley, and was referred to me.

Q. What did Mr. Howard say to you when he came up to you?

A. He said, "I would like to speak to Larry, Mr. Bishop is on his way over, and he would like to talk to Larry."

I said to him at that time, "I don't think Larry wants to talk to him."

Q. That is what Mr. Finley said to you?

A. No, that is what I told to Mr. Howard.

Q. Then did you and Mr. Finley go into the office?

A. No, I went to the far part of the hall and got Mr. Finley. Mr. Finley came back with me and spoke to Mr. Howard, and he and Mr. Howard went into the office, and I went about [1336] my business. I had other things to do.

(Testimony of Lawrence Mirken)

Q. And Mr. Howard and Mr. Finley went into the office?
A. Yes, sir.

Q. Then where did you go?

A. I stayed in the general vicinity of the outside of the office, which was the entrance to the ballroom.

Q. What did Mr. Bishop do?

A. Mr. Bishop was not there at the time. He came in a short time later.

Q. How long was Mr. Howard and Mr. Finley in the office before Mr. Bishop came?

A. Well, I wouldn't say very long. I would say perhaps five or ten minutes, to the best of my recollection.

Q. In the meantime, between the time that Mr. Howard and Mr. Finley went into the office, and before Mr. Bishop came, did you go into the office where Mr. Finley and Mr. Howard were?

A. I do not think I did, no.

Q. You were not present, then, during any part of the conversation between Mr. Howard and Mr. Finley?

A. No, I do not think I was.

Q. Then Mr. Bishop came? A. That's right.

Q. What did he do when he came?

A. I recognized Mr. Bishop as he came up the stairs.
[1337] As a matter of fact, I had been looking for him.

Q. At whose direction had you been looking for him?

A. I knew he was expected, and Larry asked me to wait until he came, I believe.

Q. How do you know he was expected?

A. I took the message from Mr. Howard that Mr. Bishop would be over very shortly.

(Testimony of Lawrence Mirken)

Q. Did Mr. Howard tell you to wait for Mr. Bishop and take him to the office?

A. No, I think Larry said, "Wait until he comes up here."

Q. What did Mr. Bishop do when he came up?

A. When he came up, I met him and I said, "They are in the office," meaning Mr. Howard and Mr. Finley, and I said, "You had better go in there." And we walked through and I opened the door and we all walked into the office.

Q. In other words, when Mr. Bishop came up, you brought him into the office?

A. That is my recollection. It is a very tiny office, and they may have come out of the office for a minute, but we all went back into the office.

Q. In other words, as Mr. Bishop came up the stairs you recognized him,—

A. Yes.

Q. — and you went up to speak to him?[1338]

A. That's right.

Q. You told him who you were?

A. That's right.

Q. And brought him directly over to Mr. Finley's office?

A. Yes. It wasn't a distance of over maybe five feet away from the top of the stairs.

Q. What band leader was playing there at that time?

A. I don't recall.

Q. There was a band playing there at that time?

A. Yes. We had a lot of bands at the Trianon.

(Testimony of Lawrence Mirken)

Q. Don't you remember that Mr. Bishop came up and went up and talked to the band leader?

A. He may have. He may have. I don't recollect, but he may have.

Q. Don't you remember Mr. Bishop, in addition to talking to the band leader, who I believe he stated in his testimony was Kenny Baker, had paced off the size of the room?

A. Not in my presence.

Q. Well, you saw him when he came up the stairs, didn't you?

A. Yes, I did.

Q. And you stated that you spoke to him when he came up the stairs, that you were looking for him?

A. I did.

Q. And you then took him over to Mr. Finley's office?
[1339]

A. That is my recollection of what happened.

Q. He was not out of your sight, was he, between the time he came up the stairs and the time he and Mr. Finley met in the office?

A. I couldn't say. I don't believe he was.

Q. You don't remember him stepping off the floor space?

A. No, I definitely don't remember that, no.

Q. And you don't remember him walking over and talking to the band leader?

A. No, I don't.

Q. Now, when you went into the office did you all sit down?

A. I sat on the desk. Mr. Bishop, I believe, sat on the chair that was next to the desk, and Mr. Finley stood up. I believe before he stood up he pulled a chair in from a little outside office—he pulled the chair from the outside office into this office, which was nothing more than a cub-

(Testimony of Lawrence Mirken)

by-hole with a desk in it, and I think Mr. Howard sat in that chair. Mr. Finley stood at the far part of the room near the safe.

Q. How long were the four of you in the little office there, talking on this occasion?

A. I don't know. I would say anywhere between 15 minutes and a half hour. It might not have been that long.

Q. You were present during the entire conversation?
[1340]

A. Yes, I was present during the entire conversation.

Q. Did you make any notes of what was said?

A. Nothing except to listen, which was—

Q. Just to listen? A. That's right.

Q. You made no written memorandum at the time?

A. No, I did not.

Q. You have read Mr. Finley's testimony in this case, haven't you? [1341]

A. I have not read Mr. Finley's testimony in this case.

Q. You have not read the transcript of the testimony given here?

A. No. It was brought up to me as I walked into the courtroom this morning and then taken right away before I was given an opportunity to read it.

Q. It was shown to you?

A. It was not shown to me. The entire transcript was handed to me and then taken away from me.

Q. You mean all these volumes were handed to you?

A. No; just one volume.

Q. Just one volume was handed to you; and who handed it to you? A. I believe Mr. Karp.

(Testimony of Lawrence Mirken)

Q. Did he tell you: "That is the testimony of Mr. Finley before this jury on this matter"?

A. Well, he said—I don't recall what he said. He said, "Read this," and that is all. I don't know whether it was Mr. Finley's testimony or Mr. Bishop's testimony or anyone else's.

Q. Then, when you came here today you did not know what you were going to testify to, did you?

A. Yes, I did.

Q. Who told you?

A. I spoke to Mr. Karp at the time I was subpoenaed.

[1342]

Q. When you were subpoenaed? A. Yes.

Q. When was that?

A. That was Saturday evening.

Q. Last Saturday? A. Yes.

Q. And it was suggested at the time that you be subpoenaed, wasn't it?

A. Mr. Karp called me up about two weeks ago and Mr. Karp asked me if I recalled being present at a conversation in the office at the Trianon.

Q. I am not asking you that. Wasn't it suggested to you that you be subpoenaed in this case?

A. No. I was told that I would be subpoenaed if they thought I would be needed.

Q. Was there any conversation to the effect that it would appear better as if you were here under subpoena rather than coming voluntarily?

A. No; there was no conversation to that effect at all.

Q. But you were talked to two weeks ago by one of the attorneys for the plaintiff? A. That is right.

(Testimony of Lawrence Mirken)

Q. But you were not subpoenaed until last Saturday?

A. That is right.

Q. Is that right? [1343] A. That is right.

Q. And you were talked to two weeks ago respecting a conversation to which you have just testified?

A. No. I believe I was talked to Saturday night with reference to the conversation. When I spoke to Mr. Karp two weeks ago, all he told me was that he had a subpoena for me and that I would be subpoenaed if they felt that my testimony was needed. Saturday night Mr. Karp came over to my house with the subpoena and told me that I would be subpoenaed to appear Monday morning.

Q. You had not seen—pardon me.

A. I am sorry, sir. That is all.

Q. You have not seen Mr. Finley during the past two weeks?

A. I have not seen Mr. Finley for, I think, more than three or four months, possible five months.

Q. Until when?

A. Until I walked into this courtroom this morning.

Q. And you haven't had any conversation with Mr. Finley? A. Not before that time; no.

Q. And you haven't been given any statement in writing as to what Mr. Finley testified to or what you were supposed to testify to?

A. I have not been given any writing; no, sir. [1344]

(Testimony of Lawrence Mirken)

Q. And what you have testified to here today is entirely out of your memory?

A. To the best of my recollection; yes, sir, the incidents.

Q. Without refreshing your memory from any notation? A. That is right, sir.

Q. Without refreshing it from any conversation you had with Mr. Finley? A. That is right.

Q. And without any reading of the transcript of the testimony? A. Definitely.

Q. Other than the fact that you were shown the transcript and before you had a chance to read it this morning, it was taken away from you again?

A. That is right.

Q. And you have not seen it since?

A. I have not.

Q. Repeat again the conversation between Mr. Bishop and Mr. Finley on the occasion of November the 8th, 1944, in Mr. Finley's office in the Trianon ballroom in San Diego.

Mr. Christensen: To which we object as having been asked and answered.

The Court: Yes. We are not going over it again. Sustained. Objection sustained, Major. [1345]

Mr. Doherty: Well, I haven't asked him, your Honor. I thought I would. I don't want to over urge it.

The Court: You heard me, Major.

(Testimony of Lawrence Mirken)

Q. By Mr. Doherty: You have no connection with Mr. Finley at this time; just an old friend of 20 years?

A. That is right.

Q. Is that right? A. Yes.

Mr. Doherty: That is all.

Mr. Christensen: That is all. You may step down, sir. Your Honor, this witness told me he is desirous of getting back to San Diego, and may he be excused now?

The Court: Unless you gentlemen want him detained, he will be excused, gentlemen.

Mr. Warne: We do not want him detained.

The Court: You may go back, sir.

Mr. Christensen: May we take the recess now? I just want to ask Mr. Finley on one matter.

The Court: Ladies and gentlemen, we will take our afternoon recess for a few minutes. Remember the admonition. Remember the admonition and keep its terms inviolate.

(Short recess.)

The Court: All present. Proceed.

Mr. Christensen: I believe that I used the recess profitably, and now announce that we rest. [1346]

Mr. Doherty: If the court please, Mr. Warne called my attention to Exhibit L which was introduced the other day but has never been read to the jury. May I read it, your Honor?

The Court: Surely.

Mr. Doherty: A photostat of a communication from Larry Finley and Associates, dated:

“Mission Beach

“San Diego 8, Calif.

“December 11, 1945

“Honorable Mayor

“City Council and

“City Manager

“Civic Center

“San Diego

“California

“Gentlemen:

“Under the terms of the contract for the leasing of Mission Beach Amusement Center, it is stipulated that the Park shall be painted during the month of January.

“From experience learned last year when the park was painted, we found that the wind and rain during the winter season which is at its height during January, February and March, destroys the [1347] newness of the paint.

“In order that the Park might appear at its very best when it is patronized the most, we respectfully request that the Council pass a resolution setting the month of April as the date for painting rather than January.

“We feel that the City Council, as well as ourselves and the many citizens who visit Mission Beach in the summer time, will be much more pleased with the appearance of the Amusement Center if this action is taken. It is really not practical to paint the Park in January and then let it stand in the winter weather for three months with only a few visitors to observe its appearance.

"We will gratefully appreciate your courtesy in granting this request.

"Very truly yours

"Larry Finley & Associates

"Mission Beach Amusement Center

"(Signed) Warner Austin

"By Warner, Austin, Manager"

Marked: "Received December 11, 1945, City Manager."

Mr. Reporter, it is Exhibit L.

May it be stipulated, Mr. Christensen, that the stamp is the "City Manager of San Diego"? [1348]

Mr. Christensen: Oh, I assume that it is. I shall raise no question on the point.

Mr. Doherty: Defendants rest, your Honor.

The Court: Now, gentlemen, I would like to have you come to the bench for a moment.

Mr. Doherty: Do you want the reporter?

The Court: No; I do not know that we want the reporter.

(Short intermission while court and counsel confer.)

The Court: Ladies and gentlemen, the court has reached the point where it is necessary for counsel and the court to marshall the evidence and to also prepare proper instructions.

A case of this kind has legal features which require very close concentration to those applications of the legal principles that are involved, and also is a case that has an extended evidential aspect which requires on the part of counsel on each side a careful analysis and succinct arrangement of an argument so that it can be presented in

the time the court has allowed for the time of argument, which is not to exceed one and one-half hours on each side, that is to say, a total of not to exceed three hours. Of course, both counsel may be generous and may be very considerate and cooperative, and they need not take that hour and a half; but they may take that length of time in presenting the situation to the jury.

Now, in order to carry out the program as orderly as is [1349] consistent and proper under the circumstances of the case, I am going to ask you, when you come back on Wednesday morning—I am going to excuse you over tomorrow, which happens to be Lincoln's birthday, also, and then we will reconvene on Wednesday morning at ten o'clock. We will reconvene after the noon recess, at 1:30. Please remember that, because some of you may have appointments and would perhaps calculate on being here at the usual afternoon convening hour, which is two o'clock, but it will not be that on Wednesday; it will be 1:30 in the afternoon.

So that you are now excused, with the admonition particularly, again, ladies and gentlemen, that you are not to suffer yourselves to be spoken to or approached by any person concerning this case or anything involved in the trial of it; do not form or express any opinions on the case until it is finally submitted to you.

Please retire, ladies and gentlemen, and be here on Wednesday morning, the day after tomorrow, at ten o'clock.

(The jury retired from the courtroom.)

The Court: The record shows that all of the jurors are without hearing. Is there anything further, gentlemen, to be presented at this time?

Mr. Collins: If the court please, we have two motions to address to the court. I believe the first in the order of priority of procedure is a motion to strike. We move that [1350] the court strike all testimony and all evidence relating to damages and to profits and losses accruing at the Mission Beach ballroom from and after the 20th day of March, 1945, on the ground that all such evidence is incompetent, irrelevant and immaterial, and not within the proper issues of the case.

In developing that point, if the court please, we rely on the case of Connecticut Importing v. Frankfort Distilleries, the case reported in 101 Fed. (2d) page 79. I am sure the court is familiar with it and the doctrine which it announces, namely, that where the damages claimed in the business or property of a plaintiff results from or are alleged to result from acts or conduct committed prior to the filing of the action, the plaintiff is limited in recovery to damages alleged and proven to have accrued prior to the filing of the suit.

We submit that that is the situation in this case.

We further urge as separate and distinct from that ground, that all evidence relating to proof of damages at Mission Beach ballroom during the operation of plaintiffs, and on the basis of which a recovery is sought by them in the alternative, be stricken on the ground that all such evidence is speculative, conjectural, and would submit to the jury evidence from which they would only be able to arrive at a determination as a result of guesswork. [1351]

I will not detail the evidence, because I think the general reference is sufficiently in the mind of the court as to what the particulars referred to were.

The Court: You might state all of your motions, both contingent and absolute, before I attempt to rule on them.

Mr. Collins: Very well.

If the court please, at this time I present to the court and serve counsel for the plaintiffs with a motion for a directed verdict at the close of all the evidence, which motion is presented and urged on behalf of the defendants now in the case, namely, Music Corporation of America, the two individual defendants, H. E. Bishop and Lawrence Barnett.

If the court would choose to read them, it would save some time, I think.

(Short intermission.)

The Court: The court has read the motion for a directed verdict.

(Said motion for a directed verdict is in the words and figures following, to-wit:)

“The defendants, Music Corporation of America, H. E. Bishop, and Lawrence Barnett, collectively and separately, move the court for a directed verdict in their favor. The defendants move that the court, at the close of all the evidence presented at the trial of the above entitled action, instruct the jury to return a verdict in favor of each and all of the defendants on [1352] the following specific grounds to-wit:

“1. The evidence presented fails to establish, as a matter of fact, a prima-facie case, or any case, or claim or cause of action in respect of each of the following matters:

“(a) Any combination, conspiracy or agreement to restrain interstate commerce in so-called ‘name’ bands, as charged in plaintiffs’ amended complaint.

“(b) Any unreasonable restraint of interstate commerce in so-called ‘name’ bands.

“(c) Any detriment or injury to plaintiffs which directly or proximately resulted from any unlawful conduct on the part of the defendants or any of them as charged in plaintiffs’ amended complaint.

“(d) Any damage to plaintiffs of a nature or character capable of determination in any reasonable manner or of admeasurement in any monetary amount.

“2. The evidence presented fails to establish, as a matter of law, a claim or cause of action in respect of each of the following matters:

“(a) A combination, conspiracy, or agreement among the defendants or any of them, and Wayne Dailard, to restrain interstate commerce in so-called ‘name’ bands, in violation of Section 1, Title 15, United States Code.

“(b) The imposition of an unreasonable restraint, [1353] or any restraint, upon interstate commerce in so-called ‘name’ bands as the direct and proximate result of concerted action on the part of the defendants, or any of them, and Wayne Daillard.

“(c) Injury to the business or property of the plaintiffs by reason of anything forbidden in the federal anti-trust laws or committed by the defendants or any of them.

“(d) Damages to the plaintiffs of an ascertainable kind, degree or amount directly attributable to conduct on the part of the defendants in violation of the federal anti-trust laws.

“3. The defendants by this reference adopt hereat as additional grounds for this motion, each of the seven specific grounds stated in the Motion for Directed Verdict

made and presented by them at the close of the evidence offered by the plaintiffs.

“This motion is based upon the entire record at the close of all the evidence herein.”

Mr. Collins: The court will note in the motion, at page 2, we have stated as Paragraph 3 that we adopt by reference in this motion all of the grounds of the motion previously urged at the close of evidence on the plaintiffs' case. And in the interests of conserving time, I should like the court and counsel to accept the stipulation that I [1354] do now repeat and urge those same grounds in this motion. I do not think it will be necessary to re-state them and re-argue them in view of the court's prior statement of attitude with respect to them.

The Court: I think not, Mr. Collins.

Mr. Collins: As to the other items, there are some overlapping aspects; but we do call attention to the grounds upon which this motion is predicated, that both in point of fact and in point of law, plaintiffs have not shown a sufficiently substantial case for submission to the jury, either on the issue of a combination, of a conspiracy, of a concert of action on the part of defendants in this action and the alleged co-conspirator, Wayne Dailard.

That even if it may be argued that, for argument's sake, such a combination has been established, there has been an insubstantial showing and one not worthy to go to the jury on the effect of that combination or conspiracy, namely, that it is not shown to have resulted in restraint upon the trade or commerce of the plaintiffs in this action, or to have injured them in the conduct of their business.

Further, that even if it may be argued that there has been shown both to be a combination and a conspiracy, and that restraints have been effectuated through it, there is no proof of damage; and when I say "damage" I mean monetary damage, damage of a character, of a type, of a degree that [1355] this jury could reflect in an award in a monetary sum.

And I do repeat one of the points urged in our original motion, that the very subject matter out of which the damages are urged to have flown is so transitory, so nebulous, so ephemeral as to not be a proper subject matter for the jury to consider whether any damages attach to it, namely, so-called name bands.

We make this motion not on that basis of our original motion in the light of the evidence as it existed at the close of plaintiffs' case, but in the light of all the evidence that has gone into the record and that is before the court and which must be before the court for the consideration of this motion.

We do repeat and urge that it is so insubstantial on all of the issues, all of which would have to be affirmatively decided in favor of the plaintiffs to support a recovery, it is so insubstantial that there is no basis upon which a verdict could properly stand.

I submit the motion without any further argument or reference to the law.

The Court: Mr. Christensen, I want to hear from you on the applicability of *Connecticut Importing Company v. Frankfort Distilleries*, 101 Fed. (2d) at page 79, upon the measures of damages that are applicable, if any, in this case.

Mr. Christensen: I have not read that case recently.
[1356]

The Court: If you desire to read it, hand it to him,
Mr. Clerk.

(Short intermission.)

Mr. Christensen: Mr. Karp has very carefully considered them and has invited my attention to some other cases. I think we might save time on it by letting him state his views.

The Court: There is an earlier case, *Lawlor v. Loewe*, in 235, I think, United States, which is the basic case, and that is a Second Circuit Court case in a very recent decision.

Mr. Christensen: Go ahead, Mr. Karp, and I will be reading this through and do what I can.

The Court: The case that I have just referred to, I suppose you are familiar with it, also, 235 U. S. at page 520-522, *Lawlor v. Loewe*.

Mr. Christensen: Shall Mr. Karp proceed, your Honor?

The Court: Yes, surely, Mr. Karp.

Mr. Karp: If your Honor please, in our consideration of *Connecticut Importing Co. v. Frankfort Distilleries* case, we believe that the distinguishing feature is the fact that in that case the court said that where the actions are continuous, where the actions complained of continue to be incurred, then the damages which are suffered are only assessable to the time the action is commenced; and if injuries which result after the action is commenced do result of these continuing actions, [1357] an additional action must be brought.

However, in our case we feel that our injury suffered as a result of the original conspiracy and action which took place prior to the time of the commencement of our action, and under the Eastman Kodak case, in our action to recover damages the future profits which would have been made but for the defendants' practices could be shown by past experience. And the court in that case said:

"The plaintiff had an established business and the future profits could be shown by past experience. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate. The defendant whose wrongful act creates the difficulty is not entitled to complain when the amount of damages cannot be accurately fixed."

This action is like a tort action. We are asking for the damages as a result of this conspiracy which took place prior to the commencement of our action. As a result of that conspiracy we not only lost the immediate profits which we would have incurred if we had gotten the name bands up to March 20th, but as a result, the reputation of the Beach and the people coming out here, as has been testified to, to dance as a habit. We were not able to establish and continue [1358] the good will of the Beach out there, and therefore our future injuries are a result of those acts, not as a result of the continuous acts. It is not like trespass; it is more like a tort. Our injuries, both the past, present and future are the result of this conspiracy which took place prior to the date of the commencement of this action; and that theory is the theory upon which we believe that the damages which were suffered should be assessed, not only up to the time of the

commencement of the action, but our future damages should be assessed under the Eastman case.

And also, under the Clark Oil Co. v. Phillips Petroleum Co., which is a recent case, 148 Fed. (2d) 580, the court said: An action for treble damages under this section is based upon tort. The amount of compensatory damages is not fixed by this section, but such damages are unliquidated—

The Court: What was that citation, 148 Fed. (2d)?

Mr. Karp: 580, Clark Oil Co. v. Phillips Petroleum Company.

The Court: Well, that is a very serious question in the case, I think, gentlemen. I think there may be factual questions there that make it necessary to cover the situation by an instruction. I called attention to Exhibit K in the case.

Mr. Christensen: May I invite your attention—

The Court: It may be that the interpretation of Exhibit [1359] K is a factual question. This is the letter of February 27, 1945 to Mr. Finley. The exhibit simply has the name in the corner "Hal Howard." I think evidence showed how the original letter which was transmitted was signed. This letter reads thus:

"Dear Larry:

"Confirming our telephone conversation of today where-by you were submitted Bob Chester and His Orchestra for March 16, 17, and 18 at \$2,500.00 against 50%; Jack Teagarden for March 30, 31, and April 1 at \$2,500.00 against 50%; and Ted FioRito on March 23, 24 and 25 and-or March 30, 31, and April 1 for \$2,500.00 against 50% each series of three nights.

"These attractions have done well on engagements not only in your territory in the past but throughout the country and have established reputations and prices in line with those which we are quoting.

"During a prior conversation that I had with you you advised you would possibly operate three nights a week. On bands the caliber of those we are discussing, as there are few engagements in this territory to fill up the early week days, the weekend dates must at least cover the operating expense and minimum salary of the organization or, of course, it is to our interest and that of the band's to route them out of the territory, [1360] where they could possibly play five or six engagements a week, thus realizing considerably more for their services than if they played off in order to play your weekend engagement, and that is why there is little difference between a two-day and three-day price.

"I am sure that the Curt Sykes orchestra would have been a good suggestion for you for Ratcliffe's; however, I understand that this booking has been filled.

"As we are now making plans for the itineraries on these bands, in case you desire to reconsider your refusal, it is important that you communicate with us at once.

"Yours very truly."

It may be that that letter, together with other correlated oral testimony in the case, would make it necessary for the court to prepare an instruction that meets with the factual situation before the court in this case and the principle announced by the Second Circuit in *Connecticut Importing Company v. Frankfort Distilleries*. [1361]

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In that case the court said on the subject under consideration:

“Neither do we find any error on the plaintiff’s appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought.” Citing a case. “Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced.” Citing *Lawlor v. Loewe*, 235 U. S. 522. “Here the plaintiff’s damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative.”

Now, here is a letter dated in February of 1945, and I am [1362] not passing on the weight of it, as that may be a factual question under all of the evidence, but here is a letter in which there is tendered to the plaintiff certain bands. Moreover, there is in the letter a request of an answer from him, a reply of some kind from him. If the evidence discloses a reply, either directly or by inference, then I think probably it is a factual question for the jury to determine whether or not the acts which give rise to damages had from their nature to be committed after the date of the letter in question, Exhibit K.

The whole situation with respect to damages, as far as subsequent acts are concerned in this case in my judgment is—and not decisively, but the mind of the court is pretty well settled on it—that unless this be a continuing conspiracy, or, first, unless there be sufficient evidence to warrant the jury in finding a conspiracy, and that I think is essentially a factual question in this case, unless there be sufficient evidence to warrant the finding of a conspiracy from a preponderance of the evidence, then upon that phase of the case there would be no damages allowable. That, of course, would not dispose of the other phase of the case, which is not predicated upon the same elements of conspiracy, but which is predicated upon a combination to produce monopoly in interstate commerce. If the conspiracy, if established, was terminated by the acts that occurred on February 27, 1945, [1363] then so far as that conspiracy feature of the case is concerned there could be no damages assessed beyond that date for two reasons; first, the conspiracy then was culminated, terminated, and if the damages are to be awarded upon the theory of conspiracy, they could only be sustained while the conspiracy was operative. If a co-conspirator, an alleged co-conspirator, had by an affirmative act, indicated abandonment of any unlawful combination, or agreement, or conspiracy, then unless the plaintiff had taken some action which indicated that he was not acquiescing in the intendments and inferences that would be deducible from this letter of February 27th, he would be confined in any damages to acts which occurred prior to that date. That, of course, does not answer the question as to whether or not damages would be assessable for any tortuous acts that might have been jointly committed by the defendants, or any of them, prior to that date which are not based upon a conspiracy.

In other words, there are two features to the case. One is an alleged conspiracy to violate the anti-trust law; an unlawful agreement, a combination, a concerted action, by the defendants in the case at this time with Mr. Dailard. The other is not predicated upon the same conspiracy elements, but upon joint unlawful acts of the defendants with Dailard, which themselves, if established to the proper degree of proof, and if they affect interstate activities, I am inclined to think, the court having ruled on [1364] the interstate character of the transaction, it makes it a question of law, and then such damages may be allowed as are shown to have been in furtherance of and in continuance of the joint unlawful acts which the jury may conclude were committed prior to the February date, and which continued thereafter notwithstanding the terms of the letter.

I hope I make that clear, because it is a serious question in the court's mind as to just what the measure of damages will be here, and where the differences are to be drawn.

Mr. Collins: Could I interrupt and make one observation, your Honor?

The Court: Yes.

Mr. Collins: I am not clear on the point the court has made because it is so at variance with my understanding of the pleadings, that there are two approaches, one, the theory of a combination and conspiracy and the other would be acts independent of a combination and conspiracy on the part of the defendants. As I conceive the case, the warp and woof is predicated upon a combination, that it is a conspiracy case, and that there could not be any violation of the anti-trust laws by these defendants in a form

that would give the plaintiffs a basis for relief unless it was established—

The Court: There must be a concerted action, of course, by two people. [1365]

Mr. Collins: Yes, but I understood the court to mean they were acting independently in some other tortuous way that could reach the same result.

The Court: The case is brought under the first and second subdivisions of the Sherman Act.

Mr. Collins: I don't want to argue the case with the court, but I think a close examination will not show that to be the fact.

The Court: You argued that before, didn't you, Mr. Collins?

Mr. Collins: I did, your Honor.

The Court: I don't think there is any necessity for reviewing that, because the court's mind is made up upon that.

Mr. Collins: If I may labor the matter for one further comment. A section 2 case would be a monopoly case. This is a case of an alleged conspiracy or a combination to restrain trade, and I think we have tried it on that theory.

The Court: Have you finished now?

Mr. Collins: Yes. I am sorry.

The Court: I think this letter is a very essential feature in the case as to when, if damages are assessable at all, as to when that would be, at what point. There may be a question as to the bona fides of this letter, whether or not it was a letter that was designed to accomplish a purpose that had already been perpetrated. That is a factual [1366] matter. That is not a matter for the court at this stage of the case, in any event, to pass upon. It is a factual matter that the trier of the facts must determine.

I shall have to go over the matter a little more carefully before the court determines just what the instructions should be. As to this requested instruction No. 20, I think it is, which the plaintiff requested, I think that is too broad in this case. As I remember, it is simply a copy of the language of Justice Holmes in an opinion in the Loewe case. That is what it is, isn't it?

Mr. Jaffe: That is right.

The Court: I don't believe it is proper to pick a statement out of an opinion in a case in the Supreme Court and to give that in a subsequent case. It is true that there is a principle there, but I have just read from this Second Circuit Court of Appeals case which somewhat departs from that principle.

Mr. Doherty: May I make one brief statement, your Honor, on the factual matter? If there is one fact that is agreed to by all sides in this case, it is this, that each engagement of each band leader is a separate engagement.

The Court: I am not going to pass upon that. That is for the jury; that one thing.

Mr. Doherty: What I had in mind was this, from the Connecticut case, that each time there was a refusal, it is a [1367] cause of action; and that the Connecticut case, when you read the cases upon which it was based, it shows that each refusal is a cause of action and you can only recover on the refusals that happened up to the time that the action was commenced, and that each subsequent refusal is a new cause of action. The statute begins to run upon each refusal in the future, and any basis of damages for refusal to act after the action is commenced, under the Connecticut Distilleries case, is speculative and cannot be recovered in the original action. It means a subsequent

action must be filed, and a subsequent action takes into consideration the subsequent refusals, the independent new cause of action that arose with each refusal.

The Court: Don't you think that the bona fides of the refusal come into the case?

Mr. Doherty: The bona fides always come into it. But assuming all of the refusals up to March 20th were in bad faith and assuming all after March 20th were in bad faith, they are still separate, distinct refusals and separate, distinct causes of action.

The Court: Wouldn't it be that unless they are the result of concerted action or a combination that existed generally for the purpose of depriving the plaintiff of bands of the type that are described in the evidence?

Mr. Doherty: That would be entirely true if there was [1368] any evidence in this case that there was an agreement between Mr. Dailard and M.C.A., in which the band leader was a part. There is no evidence here by a single band leader in this case that he was a party to any arrangement to deprive Mission Beach of an engagement. In other words, this is a conspiracy that is not capable of being carried out without the concert of a third party, namely, a band leader.

The Court: Yes, but do you think that it is necessary to have direct evidence of the activity of the band leader in the concerted understanding? Can't it be done by indirect evidence, circumstantial evidence?

Mr. Doherty: Yes, your Honor, you can prove it by indirect evidence, by circumstantial evidence, and by inferences from either.

The Court: Yes.

Mr. Doherty: But there is not a word of testimony here that M.C.A. ever said to a band leader that he should

not play, with the two exceptions and they both failed. That was when the suggestion was made to Tommy Dorsey that he not play at Mission Beach, and that failed, that did not influence the band leader there. The other was the band leader that played there on New Year's Day—

Mr. Warne: Charlie Barnet.

Mr. Doherty: Charley Barnet,—that the suggestion was made to him. There is not a single inference that you can [1369] draw from a single fact shown that a band leader was ever approached, except in those two instances, and both instances failed. On the other instances the matter is wide open and not the slightest intimation that M.C.A. ever went to a band leader and said, "Don't play at Mission Beach."

The Court: No direct evidence, but there are circumstances, and I am speaking now of the factual situation, not of the determination that should be made by the trier of the fact, but there are factual situations here that may be sufficient to justify the inferences that the inactivity, the dormancy, the disinclination of the defendant corporation was a motivating circumstance which caused or brought about the result that ensued in not obtaining bands which the plaintiff asserts he should have been able to get, provided there was a competitive field and a non-monopolistic environment in which the supplying of bands was furnished by the booking agencies, which the evidence indicates were tied up in factual ways with the band leaders.

Mr. Doherty: My argument is premised on the basis, your Honor, that there was no competition, that all of the bands were controlled by M.C.A., and when I say "controlled", I mean they acted as employment agent. Assuming that to be the fact, there is not one iota of evi-

dence, either direct or circumstantial, from which an inference may be drawn that any band leader was told that you must not or should not play [1370] at Mission Beach, or that was ever influenced by it.

The Court: There is no direct evidence, that is true. I am not going to argue it from the standpoint of counsel on the other side.

Mr. Warne: If the court please, might I be permitted an observation with respect to the law aspect?

The Court: On the question of damages?

Mr. Warne: No, not on the question of damages.

The Court: I am not going to give an expression on the facts.

Mr. Warne: Not on the facts, a pure law question, a law question which was adverted to by your Honor in part in ruling on the motion which was argued the other day by Mr. Collins, and that is the provision of the act, which is now 15 U. S. Code, that is, that the labor of a human being is not an article or commodity of commerce.

That was argued, in part, and it was my understanding that your Honor replied to it, or at least observed in ruling, put it that way, that the Baseball case which had been cited on that point, in part, on the motion, was perhaps not good law at the present time in view of the changed conditions of our economy.

The Court: That is right.

Mr. Warne: Now, I have wanted to make this comment with reference to this particular provision of the act: it is [1371] my recollection, first, that that provision of the act was not in the act at the time of the Baseball decision by Justice Holmes. In other words, this was in 1914 that this was adopted, and in that regard I want to invite your attention particularly to the ruling, or, what

is in effect the ruling of the Supreme Court in the American Federation of Musicians case. Your Honor will recall that, perhaps.

The Court: What is the citation?

Mr. Warne: 47 Fed. Supp. 304. In that case your Honor will recall the government brought a restraint case against the American Federation of Musicians. The action went off on a motion to dismiss. The bill was full and complete, and affidavits were full and complete. It was before the trial court, and it was commented upon at very considerable length. The Supreme Court affirmed the judgment in a memorandum. My thought there is this, that essentially what is being dealt with here is the labor of human beings, let's put it that way, a band leader, his featured assistants, if you please, and the musicians who perform. We are acting, that is to say, Music Corporation of America is acting only in selling that, in selling those particular services. That, I submit, is what they are selling, and it is only that, the labor, and when I say "labor", I mean their particular artistry and everything that goes with it.

The Court: That is different. [1372]

Mr. Warne: Well, their artistry is labor. In one sense of the Baseball case, in the sense, if you please, and it wasn't Babe Ruth in those days, but, as your Honor remembers, it was Wagner and LaJoie and some of the rest of them, they were dealing there with essentially the services of human beings. It is true that wasn't decided in that case, and, therefore, the case does not control either way.

I would be inclined to agree with your Honor as to the interstate features of the Justice Holmes decision, but here, I submit, that as the law proposes, essentially what we are

engaged in is the business of representing band leaders and the musicians who play with him in the finding of opportunities for employment and the making of contracts for their employment, and I submit, your Honor, that that is labor, and I submit it is essentially labor within the meaning of this particular provision of the act.

The Court: I wish I could agree with you, under the decisions of the Supreme Court of the United States. I think your philosophy is a philosophy that I would like to adopt, but it isn't the philosophy of the times. Let me point out why. I tried to the other day, but probably did it in a rather nebulous way.

The communication media in present-day activities are not the same as those in the days of the Baseball case or in the days of the Keith case. I think we had no radio in [1373] those days. We probably had the phonograph. I think we did, probably the old Edison disc.

Mr. Doherty: A kind of one.

The Court: Yes.

Mr. Jaffe: A home Gramophone.

The Court: They did not have these media of communication which we have today. In those periods a band was, as I think one of the witnesses in this case properly testified, an aggregation of musicians who played brass instruments and went down the street at the head of a procession. The other term was a string orchestra. I don't know, I suppose symphonies were in existence then. I think probably they were, that is, musical assemblies that gave interpretative music. It is not merely the playing of the instrument that makes the symphonic music. It is the interpretation, the telling of a story through music, notes, in addition to the sonorous effects of instruments.

The same thing is true, in my judgment, in these public entertainment features today. It is the element of talent which is an intangible. It is hard to appraise talent. It is something that is indefinable. It may exist in a person of physical attractions and yet who has very little mental superiority. It may exist in one who has no intellectual training and yet has great physical attractiveness and depends on the physical factors in the human being for his achievements. [1374] On the other hand, it may be that the performer has no physical attraction but has a tremendous supply of, shall we call it, spiritual or ethical or inward attitudes that are manifested in entertainment.

Now, under present-day methods those features are exploited through organized media. Where the talent was exhibited, or the labor was exhibited, in the days of the Baseball case, to maybe 10,000 people, and I don't know whether the Yankee Stadium in those days had the seating capacity it has today, but supposing it had and supposing it had a capacity of 50,000 people, today during the World Series there are 50,000,000 people that hear it. Now, why? Because of the organized entities that, by virtue of combinations of capital and enterprise and initiative, have organized systems of interstate communication. There is a big difference between the band leader who becomes popular because of his personality and the one who may be a great musician. I think Mr. Stein illustrated that in his testimony very nicely. Now, what is it that makes the individual with his gymnastic performances and his athletic manifestations, a name band, or that makes his band a name band, or a top band, as the nomenclature is in this case? In my judgment, it is the exploitation that he gets through this media I am speaking of. That was not true with Babe Ruth. People

go out to see the Yankees, or did go out to see the Yankees play ball because Babe Ruth [1375] was going to knock a home run, or they thought he was; that he was going to use, not necessarily his talent, but his skill, his eye of precision in striking at a ball at the right moment and in the right way.

I don't see any similarity, any analogy, between that and the band leader whose band gets its reputation not because he is a great musician or because he is possessed of those great talents, but because, by virtue of exploitation and by virtue of the initiative and the business acumen, and also the capital, through the use of those features he becomes well known. The people who listen over the radio, who like to dance, listen to him, listen to his music, but it isn't that music alone that attracts them. The feature is presented by the broadcasting company and by the announcers, and by other manifestations that occur in the ballroom where he is performing, and that goes out over the air, over the ether, and it is those means that make him available as a business asset.

Mr. Warne: May I be permitted one additional observation, going to this very same matter, your Honor? I tried to say, as I stopped, that I did not want to press or to argue the interstate features of the operation, which is reflected in the media now available and now used for the dissemination, shall we say, of the product of labor of these particular persons, but again I invite your Honor to read particularly the facts that were alleged by the government [1376] in the American Federation of Musicians case. There the government contended very definitely that when the Federation of Musicians said that the musicians should not make records—and, remem-

ber, these records are made by these same band leaders, it is the same element, shall we say, the same media, so to speak, and they are doing the same thing, they are making records which again go out over the air and which are sold as records—the government contended that when they notified the musicians that the musicians should not make records for Decca and Victor, and the other record companies, then they were not engaged in their efforts as a labor organization, they were not dealing in the subject of labor, and that, therefore, they were dealing in a commodity subject to the act. In affirming the judgment of the trial court, it seems to me that the Supreme Court took the position that there was soundness in the argument.

As I say here, we are charged in this complaint not with restraining the dissemination by any media whatsoever of any product which is salable or which results in any loss or damage to the plaintiff in this case, we are charged only with this: we are charged with representing name bands or orchestras, or, rather, the leaders of name bands and orchestras and preventing, by reason of our alleged representations, acts, et cetera, leaders and their bands in playing at a given place, that is to say, at Mr. Finley's place in San Diego, [1377] at Mission Beach.

Now, I say, and again I want to discount entirely the interstate feature of it, I want to say that we are charged here with unlawfully restraining the sale, so to speak, of

the labor of human beings. And I say that under the specific interdiction of the statute itself that that cannot be a commodity or cannot be considered a commodity which can be traded in and made the subject of such a suit.

Now, I want to differentiate again from this problem of the interstate quality of it. I am trying to refer only to the essential quality of what is involved in the use of the term "selling." They use the term "selling." If your Honor will examine the evidence here of the American Federation of Musicians licensing agreement, in the provisions under which we act as agents, you will find that we act only in a representative capacity. We don't sell a commodity. We haven't a commodity for sale. We are representing human beings,—workers, if you please—the same kind of workers that would not work for Decca when the A. F. of M.—and in the newspaper it was Mr. Petrillo, but the executive board and officers in the convention decided they would not make records for Decca, and there the Supreme Court said they were not dealing with a commodity, but with the labor of a human being.

Now, I wish to submit, your Honor, one other comment, if [1378] I may, on the *Ring v. Pina* case, to which your Honor adverted. In that case your Honor will recall that the point was made, and I want to invite your Honor's attention to the fact where it mentions that it was ruled out by the Third Circuit, it was ruled out by reason of the fact essentially that the playwrights there who had banded together under the Authors League

by their agreement referred to something which was a specific commodity, namely, the manuscript of a play, and if your Honor will recall, it turned on the right to make certain changes in the script, under the provisions of the contract, and the basic agreement, as it was called was held to be violative of this act, and that no changes could be made without the author's consent. They were dealing with a specific commodity, and the court so stated, that it was a tangible thing. They were not dealing with the services of a human being. I think very serious consideration should be given to the fact to which I have adverted.

The Court: It is an important feature. I tried to say the other day, and I still want to reiterate, that the line of demarcation is very close, very difficult, because of the present-day integration of activities. Labor, personal service, is so interwoven with transportation, communication, business, interrelated entities, that it is hard to separate what is purely a local matter from an interstate matter, particularly in the entertainment field, I believe. [1379] The composition of a musical score involves labor, but that is not all that makes it profitable today. The composer may be learned, erudite, highly talented musically, phenomenal, and yet unless there is something else, his talents may be noted by but a very few people.

We are talking about economics. We are not talking about purely philosophical, or ethical or musical affairs.

We are talking about economics, business, commerce, and it is that feature that I think makes it very difficult to determine with precision just what is intrastate and what is interstate during these times.

Mr. Warne: Your Honor is familiar, of course, with the American Medical Association case, which did not acquire an interstate feature, it being a District of Columbia case, where some of this argument was made, and where it seemed to me, and I am referring to that again, the court very definitely went into the agreement between the parties. The agreement between the parties involved the refusal by the parties, namely, the physicians, to serve a hospital, and referred in that instance to a business, a particular business which was in the District.

Now, I have in mind that here there is no charge on our part of any conspiracy or any agreement along with the musicians or along with any other persons of that character in connection with the rendering of these so-called—of [1380] what we have agreed, or which I contend, rather, is the labor of human beings despite the fact of its artistry or because it may be of an artistic nature. Thank you.

The Court: The motion to strike will be reserved because that involves a feature that I have been discussing on damages. I shall rule on that, and probably shall be able to announce a ruling tomorrow at 3:00 o'clock, when we meet. If not then, before the argument on Wednesday morning at 10:00 o'clock.

The second specification of the motions, that the damages are speculative and conjectural, is not well taken and the motion is denied as to that.

The motion for a directed verdict is likewise denied as to all defendants.

That simply leaves undetermined at this time, gentlemen, the question as to the proper measure of damages, and the proper instruction to the jury as to what damages, if any, may be assessed. I shall try to reach a conclusion on that by tomorrow at 3:00 o'clock.

Mr. Collins: Before the court adjourns we should like to present some written objections to the plaintiffs' instructions, and if I might note it, these are only to one to twenty-nine, inclusive. We did not have the additional instructions at the time this was prepared.

The Court: I did not receive any written objections to [1381] the instructions proposed by the defendants.

Mr. Christensen: He says he does not as yet have them.

The Court: I ought to have those so I will know what the positions are.

Three o'clock tomorrow afternoon, gentlemen.

(Whereupon, at 4:45 o'clock p. m., Monday, February 11, 1946, an adjournment was taken until 3:00 o'clock p. m., Tuesday, February 12, 1946.)

[Endorsed]: Filed February 18, 1946. [1382]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, Tuesday, February 12, 1946.
3:15 p. m.

(The following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show the appearance of counsel, that the jury is not present, and that this session was called by the court for the purpose of informing counsel as to the attitude of the court on the requested instructions by both sides in the case.

(Discussion between court and counsel on proposed instructions to the jury.)

Mr. Warne: Now, may we inquire, your Honor, in the event any exception is desired to be taken as to any instruction, the manner in which the court prefers that that be done?

The Court: It is immaterial to me. If you want to take them in the presence of the jury, you may do so immediately after the instructions are given. You can agree among yourselves as to that, and the record will be made up accordingly, so long as you both agree. Unless you both agree the Court of Appeals may look at it with technical nicety and insist that you should have taken the exceptions before the jury retired. I have called you here to discuss just what we are going to give in the instructions and what we are not going to give.

Mr. Warne: I do not anticipate anything at this time. [1384] My only thought was as to the method to be followed. My understanding of the rule is that the exception is to be taken out of the presence of the jury.

The Court: Let me see that rule again.

Mr. Warne: It is 51, I believe, under the new rules.

The Court: They used to do it before the jury.

Mr. Warne: Yes, I understand that.

The Court: It is better to take them out of the presence of the jury. So far as I am concerned, it has never irritated me, but I know it has been the source of irritation in certain instances.

Mr. Warne: I think in criminal cases you must take them in the presence of the jury.

The Court: "Rule 51. * * * At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection [1385] out of the hearing of the jury."

So far as I am concerned, each side may except to the failure of the court to give any instruction that was requested by either side, or to the modification of any instruction that was requested and given to the jury, or you may do it in any other way you want to in order to preserve your record. You may preserve it in any way you may desire.

Mr. Warne: I will have to ask counsel here as to the methods that have been suggested.

Mr. Doherty: That last suggestion, it seems to me, is the simplest method; without going into detail to take a general exception to all of the instructions of the plaintiff or the defendant, as the case may be, that the court failed to give, and to take exceptions as to those that were given for the defendants or for the plaintiffs that were modified by the court, to the extent that they were modified.

The Court: That is what I tried to say, but the Major stated it more succinctly. Is that satisfactory?

Mr. Warne: And exceptions to all requested instructions as to which objections have been interposed, as given for the plaintiffs.

The Court: What do you say?

Mr. Karp: That is perfectly satisfactory, your Honor.

The Court: It is to the court, also.

Mr. Collins: One further matter, if the court please.
[1386]

The Court: Also, Mr. Frankengerger, the clerk, wants to know about the form of verdict. Naturally, that is of concern to him. He has here submitted certain forms. Will you see if they are satisfactory, and if they are not, you had better agree upon the respective forms of verdict.

Mr. Karp: We have had copies of these submitted to us.

The Court: I think you can probably agree upon that without me.

Mr. Collins: One other thing, your Honor: The court said it would probably rule today upon the motion to strike.

The Court: I am going to deny it because I have covered it by an instruction. The motion to strike will be denied.

You ought to be able to agree, gentlemen, on the forms of verdict without my presence.

(Whereupon, at 4:40 o'clock p. m., February 12, 1946, an adjournment was taken until February 13, 1946, at 10:00 o'clock a. m.) [1387]

Los Angeles, California, Wednesday, February 13, 1946. 10 a. m.

(Thereupon the following proceedings were had outside the hearing and presence of the jury:)

The Court: Call the Finley case.

The Clerk: No. 4328-Civil, Larry Finley and Miriam Finley v. Music Corporation of America, et al.

Mr. Christensen: The plaintiff is ready.

The Court: The record shows that the jury is without hearing at this time.

Gentlemen, apparently there has been some misunderstanding by Mr. Harkness as to the hour of reconvening today. I can understand that from past experiences with people who get accustomed to certain hours in court and if there is any deviation it results in situations such as is presented now.

Mr. Harkness stated that he understood that the court would reconvene today at 1:30. As I say, I can understand how possibly he may have gotten that impression, because of the request of counsel that, instead of reconvening at 2:00 o'clock this afternoon, we reconvene at 1:30. Although apparently all of the other jurors understood it otherwise, I can understand how possibly he may have been misled. We just reached him on the

telephone at his place of business, and he stated he could be here in half an hour. I believe he is a little bit optimistic, taking into consideration [1389] where his place of business is, but I thought I would consult with you to see whether or not it is your thought that it would be best to convene at about 11:00 o'clock or a little after, or whether it would be better to convene at 1:30.

It looks now as though, on account of the length of the arguments and the instructions, the case probably will go into late afternoon. Now, as you know, the housing conditions and the culinary conditions are such that the jury's deliberations might be prolonged into the night hours, which I think would not be advisable if it can be avoided.

Mr. Doherty: I am going to reduce my argument, your Honor, if that will help the situation so far as time is concerned.

The Court: I don't think I should ask either of you to do that. It would be gracious on the part of both of you to do it, but I am not suggesting it on the part of either one. Of course, there is no jury to be prejudiced by these statements here.

Mr. Christensen: I have already indicated, your Honor, we would make it as short as we felt we could, and in no event over an hour and a half. I am optimistic now and hope that it will be much less.

The Court: What I want to know now specifically from each of you is whether you think it advisable to have the remainder of the jury wait until 11:00 o'clock, and who are [1390] now in the jury room and not in the court room, or whether it would be best to send them on their respective ways, with directions to be here at 1:30.

Mr. Christensen: The latter appeals to me.

Mr. Doherty: I had this in mind: if you have them in at 1:30 and you have two hours and a half of argument, and fifteen minutes of recess, that would take it up to a quarter to four.

The Court: And that would make it too late to have it go to the jury today.

Mr. Doherty: Then your Honor would instruct tomorrow?

The Court: That is right.

Mr. Doherty: That would be one procedure. The other is if counsel opens, say, at 11:00 o'clock or 11:15 and finishes at 12:00, and then say we reconvene at 1:00 o'clock, because all they have to do is to go out to lunch, and if that would not interfere with the plan, then I would close, say, by 2:00 o'clock and the jury would be ready to be instructed shortly after 3:00.

The Court: I am not going to state or to commit the court as to the time when the case will be submitted to the jury, because there are no facilities these days for night sessions; particularly in private litigation where the expenses have to be defrayed by the litigant. There is no way of housing jurors in the Federal Courts these days without [1391] imposing the costs on the litigants in a private suit, and in these times there are no facilities to take care of the jury in such situation. Of course, it may be that if the jury goes out in the daylight hours that it will not complete its duties and will prolong its deliberations into the night hours. That cannot be avoided. That is a matter that is brought about by the jury itself. But I do not feel that it should be submitted to them too late in the day, especially where we have mixed juries, as we do today. With men and women on

the jury, and where it necessitates a matron and a bailiff, I feel that all of those situations should be taken into consideration.

Mr. Christensen: May I make this further suggestion: Let us reconvene at 1:30 and complete our arguments, then if the court feels it is proper to give some instructions this afternoon, and not complete them, let us reconvene tomorrow at 9:30. Then the instructions won't take very long, the jury will have a fresh start and have the whole day in the daylight hours to consider the matter.

Mr. Doherty: I will leave it to your Honor's pleasure.

The Court: I think it would be better to wait until 11:00 o'clock. Then if Mr. Harkness is here at that time, we can proceed. If he is not here, we can recess until 1:00 o'clock, and he will be here at that time.

Call the jury, Mr. Bailiff. [1392]

(Thereupon, the following proceedings were had within the presence and hearing of the jury:)

The Court: The record shows that ten of the jurors are present in the jury box, and Juror Harkness is absent.

Ladies and gentlemen, we have communicated with Mr. Harkness. There has been a little misunderstanding by him as to the time of reconvening. I think he will be here at about 11:00 o'clock, so I am going to ask you to occupy the jury rooms until about that time, when you will be notified further in the matter.

We will take a recess until 11:00 o'clock.

(Thereupon a recess was taken until 11:05 o'clock a. m.)

The Court: The record will show the presence of all of the jurors. You made pretty good time, Mr. Harkness.

Juror Harkness: I wish to tender my apology to the court. It was a complete misunderstanding on my part. I understood the court was recessed until 1:30 this afternoon. I am very sorry I made that mistake.

The Court: Very well. We are glad to see you here at this time.

Juror Harkness: Thank you, your Honor.

The Court: Proceed with the arguments.

(Opening argument on behalf of the plaintiff by Mr. Jaffe.)

The Court: I think it is so close to the noon hour that [1393] we had better recess now until 1:30.

One-thirty this afternoon, ladies and gentlemen, please, and remember the admonition in the meantime and keep its terms inviolate.

(Whereupon, at 11:42 o'clock a. m., a recess was taken until 1:30 o'clock p. m. of the same day.) [1393-A]

Los Angeles, California, Wednesday, February 13, 1946. 1:30 p. m.

The Court: All present. Proceed, Major.

(Argument on behalf of the defendants by Mr. Doherty.)

(Closing argument on behalf of the plaintiffs by Mr. Christensen.)

The Court: Ladies and gentlemen, it is now twenty-five minutes of four, and this charge is quite lengthy.

I think perhaps we had better recess at this time until tomorrow morning.

During the recess, ladies and gentlemen, remember particularly the admonition not to talk about this case nor to suffer yourselves to be spoken to or approached by any person concerning the case or anything involved in the trial of this case. Do not form or express any opinions on the case until it is finally submitted to you.

If you will be here in the morning at 10:00 o'clock, ladies and gentlemen,—10 o'clock, please, tomorrow morning—you may not retire. Remember the admonition.

(Whereupon, at 3:40 o'clock p. m., Wednesday, February 13, 1946, an adjournment was taken until 10:00 o'clock a. m., Thursday, February 14, 1946.) [1394]

Los Angeles, California, Thursday, February 14, 1946.
10 a. m.

The Court: All present, gentlemen. The record will so show.

Ladies and gentlemen of the jury: Preliminary to the instructions I want to express the Court's gratitude for the patient manner in which you have apparently approached your duties. It is satisfying to observe the co-operative attitude and the patience that juries manifest and that you have manifested throughout this case, which has been prolonged to some extent. When citizens are taken away from their respective activities, and required to attend at sessions that are protracted, when they do so with the patience that apparently you have, and with attentiveness and the conscientious application to duty, they are entitled to the gratitude of the courts, and for that reason I congratulate you and express our gratitude.

You are instructed as follows:

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others. [1396]

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. Remember that you are not partisans or advocates in this matter, but are judges.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However,

you should not be influenced to vote in any way on any question submitted [1397] to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

When this case is submitted to you for decision, you are expected and required to determine the various questions and issues presented solely on the basis of the evidence introduced during the trial and the law as given to you in these instructions.

You must weight and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means [1398] that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

There are two kinds of indirect or circumstantial evidence, namely, inferences and presumptions.

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

A presumption is a deduction which the law expressly directs to be made from particular facts.

An inference must be founded: on a fact legally proved, or on such deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, [1399] the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

If you find that the facts proven in this case give equal support to each of two inconsistent inferences, then as a matter of law neither inference has been established, and your verdict must be against the person upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to a judgment.

The mere fact that this lawsuit was commenced by Larry Finley is no evidence or proof that the defendants, or any of them, have engaged in a combination, conspiracy

or agreement in violation of the Federal anti-trust laws, as charged in the complaint. Therefore, you shall not consider the complaint or the amended complaint, or any allegation in either, as proof of any fact adverse to the defendants unless, of course, an allegation has been admitted in defendants' answer. In this connection, you are informed that in their answer the defendants have not admitted but have denied all allegations of wrong doing on their part.

Various documents, called exhibits, have been introduced in evidence and their contents have been read to the jury. Among these documents have been the following:

Plaintiff's Exhibit No. 6, a bid submitted to the City Council of San Diego by Wayne Dailard, respecting [1400] the Mission Beach Amusement Center.

Plaintiff's Exhibit No. 8, a bid submitted to the City Council of San Diego by Larry Finley, respecting the Mission Beach Amusement Center.

Plaintiff's Exhibit No. 7, three newspaper advertisements published in the San Diego Tribune Sun on May 14, 15 and 16, 1945, respectively, relating to the Pacific Square Ballroom.

Defendants' Exhibits Nos. G and H, two newspaper advertisements published in San Diego newspapers on May 11, 1945, and relating to the Mission Beach Ballroom.

These instruments were admitted not as proof of the truth of their contents, but only as proof that such documents were actually prepared and filed or published, and became material to the case. Their value, weight and effect is for you to determine. Before the jury consider such documents as binding upon the defendants in this case or for the purpose of determining their liability, if

the defendant resides or is found, and shall recover three-fold the damages by him sustained and the costs of suit, including reasonable attorneys' fees.

Plaintiff in an anti-trust suit need not himself be in interstate commerce, and it is sufficient that the combination, if any, which is the cause of his injury, if any, seeks to restrain such interstate commerce.

The term "preponderance of the evidence," as used herein, means such evidence as has, when weighed with that opposed to it, more convincing force, and from which it results that the greater probability of truth lies therein.

In order for plaintiffs to recover a judgment in this case against one or more of the defendants, the law requires that plaintiffs prove, by a preponderance of the evidence, each and all of the following facts:

1. The existence between the months of November, 1944, and March, 1945, of an agreement, combination or conspiracy between one or more of the defendants and Wayne Dailard, to unreasonably restrain interstate commerce in so-called "name" [1404] bands, as alleged in the complaint and the amended complaint, and to the injury of plaintiff.

2. The actual restraint of interstate commerce in so-called "name" bands as a result of such agreement, combination or conspiracy.

3. Injury to plaintiffs which resulted directly from acts committed by one or more of the defendants pursuant to such agreement, combination or conspiracy; and

4. Injury to plaintiffs of a kind and extent which can be measured in money, and is not determined merely by conjecture, speculation or guesswork.

You may not presume that the defendants, or any of them, are liable to the plaintiffs in this action merely because the plaintiffs have filed a complaint, or an amended complaint, charging that the defendants have engaged in a combination and conspiracy to restrain interstate commerce in so-called "name" bands. The defendants, and each of them, are presumed to have conducted themselves and their business in a lawful manner until the plaintiffs prove to the contrary by a preponderance of the evidence.

Evidence has been presented to show that Music Corporation of America is one of the so-called "big four" booking agencies or personal service organizations which today represents band leaders throughout the country. You are instructed that such evidence, standing alone and in and of [1405] itself, is not proof of any violation of the Federal anti-trust laws.

During the course of the trial, frequent reference has been made to the American Federation of Musicians, which has been referred to as a labor organization and as the "Musicians Union". The American Federation of Musicians is not a defendant and is not on trial and its policies and practices are not issues in this case. Therefore, you shall not permit any sympathy or prejudice toward American Federation of Musicians to influence your consideration or decision of this case.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an

express or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common [1406] and unlawful design with which they are charged. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to

the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved. [1407]

Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.

During the course of the trial the court dismissed this action as to Jules C. Stein personally. The fact that Jules C. Stein is no longer a defendant in this action is not a fact from which you may draw any inference as to the liability of the defendants who remain on trial. You are not permitted to infer from this fact that the defendants who are still in the case are liable to the plaintiffs. [1408]

The defendant, Music Corporation of America, is a corporation and as such can act only through its officers

and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the defendant, Eames Bishop, is and was an agent of the defendant, Music Corporation of America, and that the defendant, Lawrence Barnett, is and was an agent and officer of the defendant, Music Corporation of America, and that their acts and actions in conjunction with transactions involving Pacific Square Ballroom and Mission Beach Ballroom at San Diego, California, were performed by them while acting within the scope of their authority as such agents. Thus, their conduct, and the conduct of each of them, shall be deemed by you to be the conduct of the corporation, Music Corporation of America.

Before you may return a verdict against any defendant you must find that he was a party to a combination, agreement or conspiracy to restrain interstate commerce in so-called "name" bands, and you must further find that Wayne Dailard was a party to such combination, agreement or conspiracy. Depending upon your findings, you may return a verdict against one or more defendants, and in favor of other defendants. In other words, you may return a separate verdict [1409] as to any defendant.

The plaintiffs charge that defendant, Music Corporation, has with Wayne Dailard conspired to monopolize trade and commerce in so-called "name" bands. In the eyes of the law and for purposes of applying the Federal anti-trust laws, the expression "to monopolize trade and commerce" means "to control it, to exclude others from trade in commodities in such commerce and prevent them from dealing therein in a free market."

A combination which unreasonably limits competition, which would otherwise exist between persons in similar businesses, is illegal.

The defendant, Music Corporation of America, had a legal right to deal exclusively or preferentially with Wayne Dailard, so long as it did not do so for the purpose of unreasonably restraining or monopolizing interstate commerce in so-called "name" bands pursuant to a combination or conspiracy.

The rule that a trader engaged in entirely private business may freely exercise his own independent discretion as to parties with whom he will deal, is subject to condition that a particular method of doing business must not run afoul of the anti-trust laws of the United States.

The written agreements between Music Corporation of America and Wayne Dailard, which have been introduced in [1410] evidence in this case as Defendants' Exhibits, numbers E and F, in and of themselves are lawful agreements which the parties had the right to make and to perform.

If you find that the written agreements in evidence between Music Corporation of America and Wayne C. Dailard represent the entire understanding between the defendants, or any of them, and said Wayne Dailard, respecting the matter of providing bands and musical entertainment at San Diego; and if you further find that there was no other contract or agreement and no combination or conspiracy between the defendants, or any of them, and said Wayne Dailard, as charged in Plaintiffs' complaint and in plaintiffs' amended complaint, then you cannot find for plaintiffs, unless you find from a

preponderance of the evidence that the defendants and said Wayne Dailard made and performed said agreements with the intent and for the purpose of restraining or monopolizing interstate commerce in so-called "name" bands.

The primary object of award of damages in a civil action—this is a civil action—is just compensation, indemnity or reparation for pecuniary loss, if any, that results to plaintiffs directly or proximately from unlawful conduct on the part of defendants, if any.

In a suit under anti-trust laws for claimed loss of profits if fact of damages is proved, the amount may be reasonably approximated where based upon competent evidence. [1411]

Evidence has been presented in this case which indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown on the records were necessary, proper, reasonable, and actually incurred.

In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit [1412] was commenced. There is no claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.

In an action for damages as a result of a conspiracy by defendants in violation of anti-trust laws, verdict for plaintiffs, if the jury so finds from the preponderance of the evidence, should be for the actual damages sustained, if any, and the amount of actual damages, if any, must then be trebled so that two-thirds of damages will be the penalty.

In determining the liability, if any, or the amount of damages, if any, of the defendants, or any of them, to the plaintiffs, you shall not give any consideration whatever to any evidence which has been introduced in this case relating to the financial worth or wealth of Wayne Dailard. You are instructed that Wayne Dailard is not a defendant in this action and you cannot award any judgment against him, and his financial worth or wealth has no relationship to the liability, if any, of the defendants, or any of them, and cannot be considered in

determining the amount, if any, of the judgment to be awarded in this case.

In considering the question of damages or the amount of liability, if any, of the defendants to the plaintiffs, you shall not permit yourselves to be influenced by and you shall [1413] give no consideration whatever to evidence relating to the financial position or worth of Music Corporation of America or any of its officers or employees, including the individual defendants in the court. In the event, but only in the event, you should first determine that the defendants have conspired or combined to restrain or monopolize interstate commerce in so-called "name" bands shall you consider the question of damages. Thereafter shall you consider the matter of damages, and in so doing you shall award damages only if you find that plaintiffs have suffered loss of profits in the operation of the Mission Beach Amusement Center as a direct result of a combination or conspiracy or unlawful agreement among the defendants and Wayne Dailard, the purpose of which was to unreasonably restrain or monopolize interstate commerce in so-called "name" bands, and in that event you shall consider only such losses of profits, if any, as have been shown by a preponderance of the evidence in the case to be directly and proximately attributable to said conduct of the defendants and in a definite, ascertainable amount.

Evidence has been introduced for the purpose of showing that during the operation of the Mission Beach Amusement Center by Wayne Dailard drunkenness, immorality and unsanitary conditions were permitted to exist and that the City Council of San Diego declined to renew his lease because of these conditions. [1414]

Even if you find this to be a fact, you are instructed that no evidence has been introduced to show that the defendants, or any of them, acting in concert, combination or conspiracy with Wayne Dailard were responsible for any of said conditions. Therefore, in deciding the question whether the defendants have engaged in an unlawful combination, agreement or conspiracy you shall disregard entirely and completely the evidence which has been introduced concerning unsatisfactory conditions at the Mission Beach Amusement Center during the time it was operated by Wayne Dailard. Such evidence is to be considered solely on the question of damages, and then only if and when you find from a preponderance of the evidence that defendants, or one of them, is proven to have violated the anti-trust laws of the United States, as I have stated such laws in these instructions.

The fact that I have or may instruct you upon the rules governing the measure of damages is not in any wise to be taken as an indication upon my part that I believe, or do not believe, that the plaintiffs are, or are not, entitled to recover damages, for you are the sole judges of the facts. Such instructions are given you solely to guide you in arriving at the amount of your verdict in case you find from a preponderance of the evidence that the plaintiffs are entitled to recover. If from the evidence and instructions I give you, you should find that the plaintiffs should not [1415] recover, then you are to disregard entirely the instructions which I give you governing the measure of damages.

When you retire to the jury room, ladies and gentlemen, you will choose one of your number to act as foreman, and will then proceed to deliberate carefully,

cautiously, dispassionately and impartially upon all of the evidence, apply the law which the court has given you in these instructions and throughout the case in its instructions to you.

When you shall reach unanimous agreement, that is to say, when each and every one of you shall agree upon a verdict, you will have that verdict reduced on one or the other of the blank forms which the clerk has prepared for your convenience only; have it filled out in accordance with your unanimous findings at the appropriate places and spaces by the person whom you choose as foreman, have it dated in the appropriate place, and return into court with the signed verdict. [1416]

Are there any exceptions, gentlemen?

Mr. Collins: Yes, your Honor.

Mr. Warne: Will counsel approach the bench?

(Thereupon the following proceedings were had outside the hearing of the jury:)

Mr. Collins: I believe we have an understanding effected at Wednesday's session that there is a standing exception deemed taken by either party to instructions requested and not given. I merely want the record to show that at this time.

Mr. Christensen: That is perfectly agreeable.

The Court: It is so understood.

Mr. Warne: Further, that we have excepted to any instructions as requested by the plaintiff, and to which we have heretofore noted an objection.

The Court: It is so understood.

Mr. Christensen: And that we have excepted to instructions given at the request of the defendants.

Mr. Warne: Very well.

The Court: Did you file written objections to their requested instructions?

Mr. Christensen: No, your Honor.

The Court: The record will show that while plaintiffs have not filed any written objections to requested instructions on behalf of the defendants, as given by the court, [1417] they may have an exception to such instructions.

Mr. Warne: I think it might be well that something be said to the jury so as not to give the impression that the exceptions are taken to the entire charge as made, but that we were confirming a stipulation which was heretofore entered into in the case as to the instructions.

The Court: Is there any objection to that?

Mr. Christensen: I don't see any purpose to be served by it.

Mr. Warne: I am thinking solely of the effect on the jury, of course.

The Court: I don't think they ought to know anything about it. I have told them what the law is; that is, what the law in the case is.

Mr. Warne: Very well.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: Swear the officers to take charge of the jury.

(Thereupon the officers were duly sworn.)

The Court: Go with the officers, please, ladies and gentlemen, and if you want any of these exhibits, you may ask for them and we will send them up.

You have examined these proposed forms for the verdict, have you, gentlemen? [1418]

Mr. Warne: Yes, they have been examined.

Mr. Christensen: Yes.

The Court: And they are satisfactory to both sides?

Mr. Christensen: Yes, your Honor.

Mr. Warne: Yes, your Honor.

(Thereupon the jury retired to deliberate and the following proceedings were had outside the presence and hearing of the jury:)

The Court: The record will show that the jury is out of hearing.

I want to call your attention, gentlemen, to the proposed form in which the finding is in favor of plaintiffs and against all defendants. Of course, I suppose that the jury understands its duty is that they could strike out and insert. What I have in mind is this: that each defendant, according to the instructions and according to the law, is entitled to separate consideration by the jury. The way these forms of verdict read, they must either find against all of the defendants or must find in favor of all of the defendants, which I don't believe is the correct situation. For instance, there are two personal defendants in this case in addition to the corporate defendant, namely, the defendant Bishop, the defendant Barnett, and the defendant Music Corporation of America. Now, supposing the jury wanted to make a finding in which they would use that form but they felt that [1419] one or the other or two of the defendants should be held liable and the other exonerated. I think they should be able to do it. If, however, you are satisfied with these forms of verdict and you are not going to take any exception to them, regardless of which one is used and regardless of the phraseology, I will submit

them to the jury. But I don't know if you have given that any thought.

Mr. Warne: We have no objection to them.

Mr. Christensen: I have no objection.

The Court: Very well. Give those to the foreman of the jury.

Now, gentlemen, if you leave you should leave your telephone numbers with the clerk. I think you should remain around now for a while, at least. [1420]

Los Angeles, California, Thursday, February 14, 1946.
3:44 p. m.

The Court: The record shows the jury is here at its own request.

That is correct, is it, Mr. Hudson,—Mr. Foreman?

The Foreman: Yes, sir.

The Court: What is the situation?

The Foreman: We have two or three questions which we would like to have reviewed. The first thing we would like to have is a review of the instructions pertaining to conspiracy in this case, the instructions you gave, as we find that we don't quite remember them.

The second thing we have in mind is that we would like to have information on the period to be considered in which damages, if any, may have occurred; whether it is to be considered just between January 3rd, or whatever it was, and February 20th, or what other period. Also, whether the ballroom operations only should be considered.

In addition to that, there are certain matters contained in the transcript of testimony, and we wonder if we may have the transcript of the testimony.

The Court: It is not customary to give to the jury the transcript of the testimony, but if there are any portions of the evidence which you desire to have read, you may ask for it. [1421]

The Foreman: Well, there is. If I may say, particularly we would like to have the testimony of—let me see—the testimony of Mr. Barnett, I believe it is, pertaining to the Tommy Dorsey engagement at Mission Beach. That is the particular testimony that we want.

In addition to that, when we retire to the jury room, I think we should have, possibly not all of the exhibits, but—well, I am not sure which—

The Court: We will let you have all of them.

The Foreman: Will you do that?

The Court: Yes. Then you can find those that you want. There will be no objection to that, I do not suppose.

Now, I think perhaps we had better get that testimony first, and then I will read the portions of the charge that are applicable.

Can you agree upon it, gentlemen? You have the transcript, or I have the court's copy of the transcript here. It can be found readily, I assume, the testimony of Mr. Barnett on the Tommy Dorsey engagement at Mission Beach.

Mr. Christensen: If the court please, my copy of the transcript is not here. Perhaps we could assist by looking at it with counsel while your Honor is discussing some other phase of the case.

The Court: While counsel are looking for those portions of the evidence, gentlemen,— [1422]

Mr. Warne: Your Honor, may we discuss among ourselves some further questions, if any?

The Court: Yes, but I would prefer that you do it in a low voice.

Mr. Warne: Yes, sir.

The Court: We will wait until counsel have agreed on the portions of the evidence referred to.

The Foreman: If your Honor please?

The Court: Yes, Mr. Foreman.

The Foreman: The particular testimony that we are anxious to get is that in which some testimony was given regarding a conversation with one Michaud, I think the name is, and we are not real positive that it was Mr. Barnett. It might have been Mr. Bishop, but I think it was Mr. Barnett.

Mr. Christensen: I haven't had a chance to review that.

The Court: I am not going to read anything unless you are agreed that what you hand to the court is all of the matter that the jury requests. That is the reason I have submitted the court's copy of the transcript to counsel for both sides. I understood Mr. Christensen to make the observation that he has not seen what the court has.

Gentlemen, it now appears, from the foreman's statements, that it is a specific portion of the testimony of either Mr. Barnett or Mr. Bishop that is the matter with which the jury is concerned. Am I correct, Mr. Foreman? [1423]

The Foreman: Yes.

The Court: Look through the transcript and get that portion. He states it is in the testimony of either one, or it may be in both. My own memory is not sufficiently

positive on it to state, but the record is here and there need be no question about it at all.

Mr. Doherty: There was some testimony, your Honor, of a conversation between Mr. Bishop and Mr. Michaud, and there was also some testimony respecting Mr. Barnett at a hotel in New York, about the Tommy Dorsey matter. That is the part that has been given to your Honor.

The Foreman: It is that particular testimony of the conversation with Mr. Michaud or regarding Mr. Michaud with which we are concerned. Whether it is Mr. Bishop or Mr. Barnett, we are not sure.

The Court: Is it understood that the portion referred to and interrogated about by the jury is in this transcript which has been handed to the court, from page 1077 to page 1246, inclusive?

Mr. Jaffe: If the court please, I believe Mr. Bishop also testified about it.

Mr. Warne: May I say this with reference to what was handed to the court? The matter we examined there refers to conversations, or, rather, to interrogation of Mr. Barnett relative to conversations with Mr. Dorsey or Mr. Michaud. Am [1424] I correct, Mr. Jaffe?

Mr. Jaffe: Yes.

Mr. Warne: Now, I have not looked at the testimony of Mr. Bishop as yet.

Mr. Christensen: There is separate testimony of Mr. Bishop.

Mr. Warne: Yes, there is such testimony.

The Court: When you get that, it will not be necessary for any one to mention what it is, and let's have no argument between you, gentlemen.

Mr. Warne: I am sorry.

Mr. Christensen: Your Honor, may I inquire: Do they desire the testimony of Mr. Barnett also, with the band leader, Charlie Barnett, or not?

The Court: I will ask Mr. Hudson if that is the case. He hasn't said it is. I am not suggesting that the jury want anything or do not want anything. Counsel has asked a question, and I assume that the foreman has stated precisely and extensively and accurately everything that the jury desires.

The Foreman: I think that is everything we require, that testimony of Mr. Barnett concerning Mr. Michaud and concerning the Tommy Dorsey engagement.

The Court: If there be any testimony of Mr. Bishop on the point, is it desired that that also be read? [1425]

The Foreman: If we may have it. When we hear this testimony, it may be sufficient, and we may not have to have the rest of it.

The Court: Do you have anything there?

Mr. Warne: Yes, we have it.

The Court: If you have it, we will read it.

Now, you must have your conversations quietly, gentlemen, or I am not going to permit you to have any at all.

I will read first, ladies and gentlemen, from the reporter's transcript of proceedings, which appears to be in the direct examination of the witness

LAWRENCE BARNETT,

commencing on line 4 of page 1158:

"Q. By the way, one other question I didn't go into, and should have. Did you ever have any discussion with Mr. Michaud, who has been described here as Tommy Dorsey's personal manager or manager of his orchestra, relative to his playing at Mission Beach?

"A. Yes.

"Q. Where?

"A. At the opening at the Plaza Hotel in New York City.

"Q. Who was present?

"A. Mr. Bishop, Mr. Michaud and myself.

"Q. Relate the discussion, please."

There was an objection to that, which was sustained by [1426] the court.

"Q. By Mr. Warne: Did you ever have any conversation with any other band leader who is represented by Music Corporation of America, relative to his, that is, that band leader's playing in Mission Beach?

"A. Yes.

"Q. With whom?

"A. Charles Barnet.

"Q. Did Charles Barnet play at Mission Beach?

"A. Yes.

"Q. Where did that conversation occur?

"A. The conversation took place in New York City.

"Q. Will you relate it, please?"

To which an objection was made by counsel for plaintiffs, and the objection was sustained.

(Testimony of Lawrence Barnett)

"Q. By Mr. Warne: Subsequent to that conversation did Mr. Barnet play Mission Beach?

"A. Yes.

"Q. Did you at any time ever state to Mr. Barnet that he should not play Mission Beach?

"A. No.

"Q. Did you ever at any time say to Mr. Michaud that Tommy Dorsey should not play at Mission Beach?

"A. No. [1427]

"Mr. Warne: Cross-examine."

The next matter on that phase of it appears to be on page 1184 of the reporter's transcript. I had better go back a little to connect it up, to a little earlier in the transcript, on page 1183, commencing with line 12.

"Q. You offered Charlie Barnet to play at the Casino Room?

"A. At the Casino Gardens, yes.

"Q. And Mr. Finley wanted him also for the Mission Beach Ballroom?

"A. Mr. Finley never talked to me about Charlie Barnet for the Mission Beach Ballroom.

"Q. You know that Charlie Barnet did play at the Mission Beach Ballroom?

"A. Yes.

"Q. Did you have anything to do with that booking?

"A. Yes.

"Q. Did you make the contracts out?

"A. No, but Mr. Barnet talked to me about it in New York City.

"Q. You didn't have anything to do personally with the contracts?

"A. No, I believe Mr. Bishop submitted the contracts.

(Testimony of Lawrence Barnett)

"Q. Did you have any part in the preparation of [1428] the contracts for the Tommy Dorsey booking, Mr. Barnet?

"A. No, Mr. Bishop prepared them.

"Q. You talked to Tommy Dorsey, though, while he was in Boston, shortly before he came out to play that engagement, didn't you?

"A. I did not.

"Q. I mean, by telephone?

"A. No.

"Q. Did you talk to him at all while he was in the East concerning that booking?

"A. No.

Mr. Christensen: Thank you very much, Mr. Barnett." That seems to be all that counsel have indicated.

Mr. Warne: Your Honor, I think there is something additional I inquired into, as I recall, on redirect.

The Court: On page 1187, which seems to be the redirect examination by Mr. Warne, commencing with line 15.

"Q. Did you have any conversation with any band leader who is represented by your company relative to the respective merits of Pacific Square and Mission Beach as ballrooms in San Diego?

"A. One.

"Q. Who?

"A. Charlie Barnet. [1429]

"Q. Was that the conversation in New York, that you refer to? "A. yes.

"Q. That is the one you referred to in the cross examination of Mr. Christensen also?

"A. Yes.

(Deposition of Lawrence Barnett)

"Q. Will you relate it, please?"

There was an objection to that, and I think I will read the record:

"Mr. Christensen: To which we object as calling for hearsay.

"The Court: You did open the door a little on it, I believe.

"Mr. Christensen: I didn't ask for any conversation.

"The Court: I know, but you opened the door. I will permit him to answer.

"The Witness: A. I was in New York City and Mr. Charlie Barnet called me at our New York office, and told me Larry Finley was in town and taking him around, showing him the sights, and that he liked Finley very much, he was a very nice fellow, and would like to play for him in San Diego at Mission Beach and he wanted to know if we had any objection.

"I said, 'No, if you want to play down there, [1430] it is all right.' I said, 'You have played for Pacific Square in the past. I think if you go to Mission Beach you might be making a mistake because you might be antagonizing the owner of Pacific Square.'

"Mr. Barnet said he didn't care, he would like to play for Larry Finley because he was a nice fellow. I said, 'O.K.'

"Mr. Warne: No further questions.

"Recross Examination.

"By Mr. Christensen:

"Q. So he insisted on it anyhow, even though you advised against it?

"A. I didn't advise against it.

(Testimony of Lawrence Barnett)

“Q. You told him he was making a mistake, didn’t you?”

“A. Well, that isn’t advising against it.

“Q. Hadn’t Charlie Barnet played at Mission Beach before?”

“A. I don’t know. I don’t think so during the time Larry Finley had it. If he played there when Dailard had it, I would have to look up the records before I could tell you.

“Q. You did not look up the records before you told him he was making a mistake in playing at Mission [1431] Beach, did you?”

“A. No.

“Q. You were afraid he would make Dailard mad, weren’t you?”

“A. Wait a minute. Dailard didn’t have Pacific Square at that time, so I wasn’t afraid he would make Dailard mad.

“Q. No, you thought he would make Finley mad if he played at Pacific Square?”

“A. No, Dailard didn’t have anything to do with Pacific Square when Barnet played at Mission Beach.

“Q. He didn’t?”

“A. No.

“Q. When did he play at Mission Beach?”

“A. He played over Christmas and New Year’s, and the first week of January.

“Q. And Finley had the Mission Beach Ballroom at that time?”

“A. That’s right.

“Q. And Dailard—or, Stutz had Pacific Square?”

“A. That is correct. Now you are right.”

That is the end of that. That seems to be all of the testimony from Mr. Barnett upon that point.

Now, counsel have suggested a portion of the testimony of Mr. Bishop on the point. [1432]

This mark indicates it, does it, gentlemen?

Mr. Jaffee: Yes, your Honor.

The Court: This, apparently, is on cross examination of Harold Eames Bishop, on page 1068 of the reporter's transcript:

"Q. You recall the booking there of Tommy Dorsey into the Mission Beach ballroom, don't you?

"A. Yes.

"Q. You know about that, don't you?

"A. Yes.

"Q. You first learned about it when Tommy Dorsey's manager, Mr. Michaud, called and told you to issue the contracts?

"A. I don't recall whether that is the first knowledge that I had that the booking was being contemplated, no.

"Q. What is your best memory as to your first knowledge of that matter, Mr. Bishop?

"A. Well, I had heard discussion prior to the time that I was advised to issue the contracts that Tommy Dorsey was considering going to Mission Beach.

"Q. And you talked to Mr. Michaud?

"A. That is right.

"Q. He at that time was in New York?

"A. That is correct.

"Q. And you requested him not to book the date [1433] at Mission Beach, didn't you?

"A. I did not.

(Testimony of Lawrence Barnett)

"Q. Did you tell him that he should not play down there?

"A. I told Mr. Michaud that Pacific Square had presented Tommy Dorsey's orchestra many times in the past; that his orchestra had always enjoyed a very exceptionally fine business at Pacific Square. I told him that, in my opinion, my advice would be for him to continue appearing at Pacific Square for reasons: One, I thought his gross would be bigger; two, the Pacific Square was not a seasonal operation, and that there might be occasion when Mr. Dorsey would be available for booking in San Diego possibly in the winter-time when it was not advantageous and sound business to play at a beach resort; and I did not feel that he should incur the displeasure of Mr. Dailard by playing competition to him.

"Q. And Mr. Michaud told you that Mr. Tommy Dorsey wanted to play there, though, at the Mission Beach ballroom?

"A. Mr. Michaud at that conversation told me that he would discuss the matter with Tommy Dorsey and that he would advise me back.

"Q. You asked Mr. Michaud if it would be all [1434] right with him, Mr. Michaud, for you to call Tommy Dorsey directly at the place he was playing then, which I believe was Boston; that is correct, isn't it?

"A. I may or may not have made that statement. I don't know.

"Q. And you did telephone to Tommy Dorsey in Boston, didn't you?

"A. I did not telephone Tommy Dorsey.

(Testimony of Lawrence Barnett)

"Q. Well, you talked to him there?

"A. I did not talk to Mr. Dorsey.

"Q. Did you talk to Mr. Dorsey at all?

"A. I did not talk to Mr. Dorsey personally relative to the appearance in San Diego.

"Q. How many times did you talk to Mr. Michaud about it?

"A. To my knowledge, I talked to Mr. Michaud only on this one conversation, and I don't recall exactly whether I was advised by wire or by telephone call or through another member of our organization to issue the contracts. That may possibly be another time that I talked to Mr. Michaud.

"Q. Even though you had tried to discourage Mr. Michaud—Mr. Dorsey, through Mr. Michaud, from playing Mission Beach ballroom, he said he wanted to [1435] play Mission Beach ballroom, didn't he?

"A. The only information following the discussion which I have herewith stated to you was the information that the contract should be issued, and a statement of terms under which those contracts should be issued.

"Q. In other words, you were advised by Tommy Dorsey of that fact?

"A. By Arthur Michaud.

"Q. Now, that was a direct booking by Mr. Finley with Mr. Tommy Dorsey?

"A. The booking—the mention of the price was direct. The booking was executed by Music Corporation of America, in fact we secured the signature of the principal parties.

(Testimony of Lawrence Barnett)

“Q. You insisted on that, didn’t you?

“A. We insisted that the contract be on Music Corporation of America forms.

“Q. At that time you wanted it on M.C.A. forms; is that right?

“A. I don’t—your implication there—we always insist on our bands that they be on M.C.A. forms.”

Then the inquiry goes into another phase of the matter. That seems to be all that counsel have suggested on that, [1436] Mr. Hudson.

I will now read the portion of the charge that you have asked for. The first inquiry was for the instructions on the question of conspiracy. I shall reread those instructions:

“A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

“To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design with which they are charged. In other words, when

an unlawful end is sought to be effected, and two or more persons, actuated by the [1437] common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

“Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an [1438] inference from facts proved.

“Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

“Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.”

Then there was the question as to the period of damages, if any, I believe:

“Evidence has been presented in this case which [1439] indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event that you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown

on the records were necessary, proper, reasonable, and actually incurred.

“In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. [1440] Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit was commenced. There is no claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.”

The Court: Mr. Foreman, do you think that covers it, or do you think I should read the other instructions that were given on the subject of the measure of damages, if any?

The Foreman: If I may, I will sort of poll the jury.

The Court: Yes, sir.

The Foreman: It seems to us that will be sufficient, your Honor. Thank you very much.

The Court: Very well. Ladies and gentlemen, you may retire again, please, and we will send up the exhibits.

(Whereupon, at 4:28 o'clock p. m., the jury retired to continue its deliberations.) [1441]

Los Angeles, California, Thursday, February 14, 1946.
11:45 p. m.

The Court: The record shows that all the jurors are here, having been brought into court at their request. I shall ask Mr. Hudson, the foreman, a few questions.

Mr. Hudson, you have addressed a note to the judge, as follows:

"We have not been able to arrive at a verdict and feel that further deliberation at this time is useless. A. W. Hudson, Foreman."

Is it a question of law, or a question of fact, Mr. Hudson, in your opinion, or is it both?

The Foreman: Well, it is more a question of fact, your Honor.

Do you want me to speak freely?

The Court: No, not just yet. I want to ask you a few questions.

The Foreman: A possible question of law. However, more a question of fact.

The Court: Of course, if it is a question of fact and there is a fixed division, why, there isn't anything that the court can do, because that is an exclusive function of the jury to determine questions of fact in a jury case. If it is a question of law, of course, it can always be clarified.

The Foreman: I might say that there is some question [1442] which probably is a question of law as regards the conspiracy angle. I might express it this way, that our deliberation has been along this line, that we had to arrive at a verdict, a unanimous verdict, as regards the conspiracy causing damage to Finley.

The Court: Yes, sir.

The Foreman: The mere fact of a conspiracy was not our problem. It was a conspiracy that caused damage to the complainant. That was the basis of our consideration.

The Court: I gather from that, then, that the jury might have overcome the question of liability, but when it came to the question of damages there was an impasse. Does that express it?

The Foreman: No, that is not correct. It isn't—you mean a question of the amount of damages?

The Court: Yes, sir.

The Foreman: No, that wasn't the thing that has stopped us.

The Court: It was a question, then, a factual question as to whether the evidence satisfied all of you that there had been a combination or conspiracy—

The Foreman: Yes, sir.

The Court: —in restraint of trade?

The Foreman: Which resulted in damage.

The Court: Do you think that there is any reasonable [1443] probability of an agreement in the case if the jury is permitted to deliberate longer?

The Foreman: Well, I had thought that this group of people should be able to arrive at a verdict, but in our present condition, anyway, why, I doubt if there is a chance for us to arrive at it.

The Court: There has been a full and free discussion on the part of every juror?

The Foreman: Constantly, from the time when we first went up there, except for the time when we went out for dinner, and I think, your Honor, there has been an honest desire on the part of all concerned to arrive

at a conclusion, and we have not been able to arrive at it.

The Court: I see. Thank you, Mr. Hudson.

I will go down the line and ask all of the jurors how they feel about it.

Mr. Harkness, how do you feel about the situation? Do you think there is a reasonable probability of an agreement if the jury is permitted to deliberate further, or if there is anything the court can clarify? Of course, I will not instruct you on the facts, ladies and gentlemen.

Juror Harkness: At the present time, and under the present circumstances, your Honor, I do not think there is a reasonable chance.

The Court: Mrs. MacCue, how do you feel about it? [1444]

Juror MacCue: It seems to me that eleven people ought to be able to get together, with the intelligence that the other ten have got anyway. It seems to me that we ought to be able to get together. We are not very far apart.

The Court: Mr. Gibbon, how do you feel about it?

Juror Gibbon: I feel much as Mr. Harkness does, your Honor. I think, your Honor, at the present time there is little possibility.

The Court: Now, what do you mean by "at the present time"? Of course, we are not rushing the jury. We will give you all the time that is necessary for you to deliberate on the case.

Juror Gibbon: It is impossible to predict, of course, what changes might occur, but I see little possibility now of an agreement.

The Court: But you think it is not impossible? Is that it?

Mr. Gibbon: Not altogether, I venture.

The Court: Mrs. Cronk, how do you feel about it?

Juror Cronk: Right at the moment, as I recall our last discussion, it seems that we are at a bit of an impasse.

The Court: And, Mrs. Anderson, how do you feel about it?

Juror Anderson: The same people who are disagreeing now are the people who disagreed when we first started to deliberate, so I question that there is much chance. [1445]

The Court: The situation, then, is about the same, without asking you numerically at all?

Juror Anderson: That is right.

The Court: It is about the same as it was at the beginning?

Juror Anderson: That is true, yes.

The Court: There hasn't been much of a change, then, during the twelve hours that the jury, with the exception of the time at meals, has been deliberating? There hasn't been much change?

Juror Anderson: I believe one vote.

The Court: Mr. Ahlswede, how do you feel about it?

Juror Ahlswede: I don't believe there is any chance at the present time of arriving at a verdict.

The Court: Now, that condition there "at the present time," do you think that if the jury deliberate further or discuss the case further—

Juror Ahlswede: No, there hasn't been any change in sentiment within the last five or six hours.

The Court: Mr. Gould, how do you feel?

Juror Gould: Well, I felt at one time that we were very close to agreement. There are certain questions

we have asked ourselves. I think we are completely confused at this point. I know I am. We have all gotten different ideas. We have tried to figure out what the other person is talking [1446] about, and I think we are in a confused state at this point, but I think it is possible for us to get together. When we can do it, I don't know.

The Court: Do you think it is a matter on which the court can clarify the situation at all? If it is a question of law, the court can clarify it. If it is an exclusive question of fact, the court, of course, cannot invade the province of the jury, and will not attempt to do so.

Juror Gould: There are certain things that would have to be clarified before we get together. I know that. There are certain things that probably the court can't answer; that is, that he can't solve the problem for us. There would probably have to be a certain amount of agreement on the points we need clarified, your Honor. It is hard to say how we can get together.

The Court: Mr. Fisher, what is your opinion on it?

Juror Fisher: Well, I think everybody is over-tired, and I think it would be a better idea to continue tomorrow.

The Court: You think after a rest period, if the jury were to resume its deliberations, that there is a probability of an agreement?

Juror Fisher: Oh, yes. We have reached an agreement partly, but not to the fullest extent.

The Court: I see. Mr. Hall, what is your view?

Juror Hall: I feel that an agreement will be reached [1447] with further deliberation and possibly a clarification of one matter of law.

The Court: Will you state that matter of law, Mr. Hall?

Juror Hall: Perhaps I should say if the court would review the interpretation of that portion pertaining to the conspiracy.

The Court: Mrs. Dabbs, what is your view of it?

Juror Dabbs: I think eventually we can come to some decision. We are certainly trying hard.

The Court: I am sure you are all doing that.

Now, gentlemen, I think there are no accommodations. That is the difficulty in the housing situation at this time. It might be well to let the jurors go home. We could do that only by stipulation, of course,—let them go to their respective homes and return tomorrow and renew their deliberations.

It does seem from the concensus here that there is good reason to feel that there may be an agreement in the case, and, of course, if that can be reached it is certainly desirable. The case has taken practically ten days to try. It has been a very expensive case to both sides, and if it is probable, reasonably probable, that they would be able to agree, I think they should be given the opportunity to do so. But, of course, that is a matter for the litigants to determine, and they must do it by consent, or there isn't any power in the [1148] court to do so, excepting I may say I feel very disposed to give them the opportunity, from the expressions that have

been made. I am rather hopeful that there would be an agreement in the case.

Mr. Doherty: I was going to suggest, after listening to the statements made, if your Honor would feel disposed to ask those that felt if they did go home tonight and came back at 10:00 o'clock in the morning there would be a reasonable probability of a verdict being reached to raise their hands, and then those that feel that no progress could be made in that event, if that opportunity was given them by your Honor, to indicate in like manner.

The Court: What do the gentlemen for the plaintiffs say?

Mr. Jaffe: If your Honor please, the plaintiffs are perfectly willing to stipulate that the jury may return to their respective homes and to return tomorrow for further deliberations.

The Court: I think that I might ask Mr. Gibbon: Do you think that by returning home and resting—I realize that it is late and I realize that you have been working arduously—if that opportunity is given for rest, and then to resume deliberations tomorrow, that there is some probability of an agreement?

Juror Gibbon: Yes, sir, I think it is quite probable.
[1449]

The Court: Mr. Harkness, how do you feel about that?

Juror Harkness: I believe so, your Honor.

The Court: I think then we had better do that. If there is a reasonable probability of an agreement in this case, it should be had.

If it is agreeable to both sides and is stipulated in the record, I think we shall permit the jurors to return to their homes and then return here tomorrow morning at 10:00 o'clock. Would that be satisfactory?

Mr. Doherty: I was going to suggest, your Honor, 11:00 o'clock.

The Court: I think so. Some of the jurors' homes are quite a distance away, and I think if you are back at 11:00 and then resume deliberations. We will assemble in the court room at 11:00 o'clock in the presence of the parties. Now, particularly when you separate, ladies and gentlemen, do not suffer yourselves to be spoken to or approached by any person concerning the case, and do not talk about the case among yourselves during this separation. Do not form or express any opinion on the case until it is finally submitted to you.

Mr. Doherty: May I speak to counsel?

The Court: I want to say again, without unduly stressing the point, that the case has been a lengthy and an involved case, and an expensive case to both sides, and it should be [1450] decided, if it can be without violence to the individual judgment of the jurors.

Mr. Warne: May we suggest, your Honor, that the request has been made, and inasmuch as there has been a suggestion from some of the jurors, that when we resume tomorrow perhaps the court would be willing

again to read the whole of the instructions of the court to the jury, and that it would be of some assistance to them?

The Court: I would be very glad to, and if you desire to propound any questions at the conclusion of the reading of the instructions; in other words, if the instructions, particularly on the subject-matter that has been stated, are not clear and you propound any question to the court, the judge will try to answer it. You might overnight be thinking of the situation yourselves, and then tomorrow morning we will make another effort to see if there can be an agreement in the case.

You will be excused, ladies and gentlemen, until 11:00 o'clock tomorrow morning. Remember the admonition and be here at that time.

Mr. Jaffe: Your Honor, the stipulation will appear in the record?

The Court: I beg your pardon?

Mr. Jaffe: The stipulation may be set forth in the record, that it is stipulated to? [1451]

Mr. Doherty: Certainly. It is agreed that the jury is to return at 11:00 o'clock tomorrow morning.

The Court: Very well. At 11:00 o'clock tomorrow morning.

(Whereupon, at 12:02 o'clock a. m., Friday, February 15, 1946, an adjournment was taken until 11:00 o'clock a. m., Friday, February 15, 1946.) [1452]

Los Angeles, California, Friday, February 15, 1946.
11:00 a. m.

(Thereupon the following proceedings were had outside the presence and hearing of the jury:)

The Court: Call the case.

The Clerk: No. 4328-Civil, Larry Finley, and Miriam Finley v. Music Corporation of America, et al.

Mr. Collins: May it please the court: At this time the defendants, in view of the developments which occurred last night, namely, the intimation on the part of the jury that it desired further instructions, we have prepared and are submitting herewith a written request for additional instructions on the part of the defendants. Counsel for the plaintiffs have been served with the copy.

The Court: What is the attitude of the plaintiffs?

Mr. Christensen: With reference to these instructions?

The Court: You have heard the proceedings.

Mr. Christensen: I think these instructions are very unfair.

The Court: You mean you object to the giving of the instructions?

Mr. Christensen: These instructions, yes, sir.

The Court: The court, by hearing you in this matter, is not intimating that it is appropriate or within the rules, the spirit of the rules, to accept from counsel for either [1454] side or the litigants for either side any additional requests to instruct the jury. On the contrary, it is inclined to think that no such requests should be accepted.

The court has read the defendants' request for additional instructions, and in addition to its reason which is assigned, it is of the opinion that many of the requested instructions are embodied in the charge given to the jury and to repeat them at this time, without any request from the jurors that there is anything in the situation that prompts the jury to request any such reiteration, would be prejudicial.

Mr. Warne: May we have a specific exception to your Honor's ruling?

The Court: Yes.

Mr. Warne: Thank you.

The Court: The record should show these, Mr. Frankenberger, so that it will show what they are talking about.

Call the jury.

Mr. Christensen: Your Honor, may I make one suggestion: Would your Honor inquire of the jury if the form of the verdict, it being as to all of the defendants, if that is confusing to them?

The Court: I asked you both about that yesterday and both of you agreed that you were satisfied with the forms of verdict.

Mr. Christensen: Yes, I did that. [1455]

The Court: I don't think I will indicate in any manner, gentlemen, the court's view on the weight of the evidence.

Mr. Warne: May I inquire, does your Honor propose to reread the instructions, as suggested last evening?

The Court: I don't know now just what I shall do. I will do it when the jury comes.

Mr. Doherty: May I make one further inquiry? Do you think if counsel for each side had seven or eight

minutes to reargue certain features of the facts it would be of any help; say, not longer than six or seven minutes each?

The Court: I don't know.

(The following proceedings were had within the hearing and presence of the jury:)

The Court: The record shows that the jury is all present and apparently in vigorous, good-natured appearance.

Ladies and gentlemen, last night when we recessed until this hour of 11:00, there were certain requests made. I think I have them all in mind, Mr. Foreman, but would you mind repeating what those requests were, if you remember them specifically. My recollection is that the jury desired to have reread the instructions of the court on conspiracy.

The Foreman: Your Honor, there were a number of questions. Are you going to read the instructions this morning?

The Court: I am going to comply with whatever request the jury has, so far as I can. [1456]

The Foreman: There was a question regarding the conspiracy, and which was not so important, I think. There was also a question regarding the computation of the damages, which is included in your instructions, we all remember, but we are a little bit indefinite about that, as to just what that said. You mentioned in your instructions about trebling them, if any, and we are in doubt whether we are to treble them or the court trebles them. We didn't know just how that was set, and those points are the principal ones, as I remember.

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The Court: The last question can be answered categorically from the bench at this time, and is answered that if you find damages it is the duty of the jury to treble them. There is no equivocation about that, ladies and gentlemen, and there should be no uncertainty about that.

The Foreman: Thank you.

The Court: Is it desired that the court read the instructions on conspiracy again?

The Foreman: Yes, sir.

Mr. Warne: If the court please, may we be permitted to approach your Honor?

The Court: Yes, you may approach the bench.

(Thereupon the following proceedings were had outside the hearing of the jury:)

Mr. Warne: The defendants request that inasmuch as [1457] the subject of conspiracy and the word "conspiracy" is contained in numerous of the instructions, and referred to, that the whole of the instructions to the jury be reread, in order that the element of conspiracy, as it is generally set out in various places in the context, be given to them in that light.

Mr. Christensen: I think that whatever the court believes would comply with the request of the jury, that that only should be done.

Mr. Warne: May I say this further: We would also specifically note an exception to the reading of any special portion of the conspiracy instructions, for the reason that we believe that it can only be considered, as stated before, in the light of the whole of the context of the instructions.

(Thereupon the proceedings were resumed in the hearing and presence of the jury:)

The Court: Yes, Mr. Foreman?

The Foreman: If the court please, we have had a little discussion here in the jury, and it seems to be the consensus of opinion that we would like to have all of your instructions reread.

The Court: I find that there was a little introductory part given, and I think I ought to read that also. It is all in the transcript, and I will read from the transcript.

“Ladies and gentlemen of the jury: Preliminary to the [1458] instructions I want to express the court’s gratitude for the patient manner in which you have apparently approached your duties. It is satisfying to observe the cooperative attitude and the patience that juries manifest and that you have manifested throughout this case, which has been prolonged to some extent. When citizens are taken away from their respective activities, and required to attend at sessions that are protracted, when they do so with the patience that apparently you have, and with attentiveness and the conscientious application to duty, they are entitled to the gratitude of the courts, and for that reason I congratulate you and express our gratitude.

“You are instructed as follows:

“If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

"If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

"I have not expressed, nor intended to express, nor have [1459] I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

"The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. Remember that you are not partisans or advocates in this matter, but are judges.

"It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other [1460] jurors.

“When this case is submitted to you for decision, you are expected and required to determine the various questions and issues presented solely on the basis of the evidence introduced during the trial and the law as given to you in these instructions.

“You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

“You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

“You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a [1461] fact or facts.

“You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

“You are to decide this case solely upon the evidence that has been received by the court, and the inference

that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

“There are two kinds of indirect or circumstantial evidence, namely, inferences and presumptions.

“An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

“A presumption is a deduction which the law expressly directs to be made from particular facts.

“An inference must be founded: on a fact legally proved, or on such deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

“If you find that the facts proven in this case give equal support to each of two inconsistent inferences, then [1462] as a matter of law neither inference has been established, and your verdict must be against the person upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to a judgment.

“The mere fact that this lawsuit was commenced by Larry Finley is no evidence or proof that the defendants, or any of them, have engaged in a combination, conspiracy or agreement in violation of the Federal anti-trust laws, as charged in the complaint. Therefore, you shall not consider the complaint or the amended complaint, or any allegation in either, as proof of any fact adverse to the defendants unless, of course, an allegation has been admitted in defendants’ answer. In this con-

nection, you are informed that in their answer the defendants have not admitted but have denied all allegations of wrong doing on their part.

“Various documents, called exhibits, have been introduced in evidence and their contents have been read to the jury. Among these documents have been the following:

“Plaintiff’s Exhibit No. 6, a bid submitted to the City Council of San Diego by Wayne Dailard, respecting the Mission Beach Amusement Center.

“Plaintiff’s Exhibit No. 8, a bid submitted to the City Council of San Diego by Larry Finley, respecting the Mission Beach Amusement Center.

“Plaintiff’s Exhibit No. 7, three newspaper advertisements published in the San Diego Tribune Sun on May 14, 15 and 16, 1945, respectively, relating to the Pacific Square Ballroom.

“Defendants’ Exhibits Nos. G and H, two newspaper advertisements published in San Diego newspapers on May 11, 1945, and relating to the Mission Beach Ballroom.

“These instruments were admitted not as proof of the truth of their contents, but only as proof that such documents were actually prepared and filed or published, and became material to the case. Their value, weight and effect is for you to determine. Before the jury consider such documents as binding upon the defendants in this case or for the purpose of determining their liability, if any, to the plaintiffs, it would be necessary for the plaintiffs to present other evidence respecting the matters stated in such documents and it would be necessary that

that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as it is stated in the instructions.

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such other evidence shows that the defendants participated in the preparation, filing or publishing, as the case might be, of the documents attributed to Wayne Dailard and the Pacific Square Ballroom, or that such documents were prepared in pursuance of a combination or conspiracy of which the defendants were members or participants at the time of their preparation.

“Unless you find from other evidence in the case that the defendants were acting in concert, combination or conspiracy with Wayne Dailard at the time that Wayne Dailard prepared [1464] and submitted his bid to the City Council of San Diego and at the time that said newspaper advertisements were published in behalf of the Pacific Square Ballroom, you shall give such instruments no consideration whatever in arriving at your verdict in this case.

“The plaintiffs in their complaint have charged, among other things, that the defendants have engaged in a combination, agreement and conspiracy to restrain interstate commerce in violation of the Federal anti-trust laws. It is an offense against the laws of the United States to engage in such a combination, agreement or conspiracy. Therefore, before you may find in favor of the plaintiff on such charge, you must find by a preponderance of the evidence that the defendants, or some of them, have engaged with Wayne Dailard in such combination, agreement or conspiracy.

“The meaning of ‘commerce’, as defined by the dictionaries and encyclopedia and other books of that period, show that it included trade, business in which persons bought, sold, bargained and contracted, and this meaning has persisted to the present time.

“The business offices of Music Corporation of America are located throughout the United States and communicate with each other by telegraph, telephone and mail, and in doing so cross state lines. The substantial business of preparing and booking an entire itinerary for the appearances of “name” bands [1465] in various states of the union, which preparation is accomplished by the use of telegraph, telephone and mail, is interstate commerce.

“The anti-trust laws of the United States provide that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal.

“The law further provides that every person who shall combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states shall be deemed guilty of an unlawful act.

“The words ‘restraint of trade’ in Section 1 of Title 15 of the United States Code are to be construed as including ‘restraint of competition.’ Full, free and untrammelled competition in all branches of interstate commerce is the desired end to be secured.

“The determination of whether there has been a restraint of trade or restraint of competition must depend upon the facts and circumstances of each individual case. It is a policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade.

“The law also provides that any person who shall be injured in his business or property by reason of anything

forbidden in the anti-trust laws may sue therefor in any District Court of [1466] the United States in the district in which the defendant resides or is found, and shall recover threefold the damages by him sustained and the costs of suit, including reasonable attorneys' fees."

Now, I think I should, because of the question propounded by the foreman, amplify that statement to this extent, that with respect to the costs of suit and reasonable attorneys' fees, if any, that is not a matter that need engage the attention of the jury. Those are matters that, if the predicates and correlative antecedents are established to the satisfaction of the jury, will require the attention of the court without the jury. But the question as to damages and the threefold character is essentially one for the jury to consider under all of the evidence and under all of the instructions that have been and are now being given.

Now, proceeding to read further from the instructions:

"Plaintiff in an anti-trust suit need not himself be in interstate commerce, and it is sufficient that the combination, if any, which is the cause of his injury, if any, seeks to restrain such interstate commerce.

"The term 'preponderance of the evidence,' as used herein, means such evidence as has, when weighed with that opposed to it, more convincing force, and from which it results that the greater probability of truth lies therein.

"In order for plaintiffs to recover a judgment in this [1467] case against one or more of the defendants, the law requires that plaintiffs prove, by a preponderance of the evidence, each and all of the following facts:

"1. The existence between the months of November, 1944, and March, 1945, of an agreement, combination or conspiracy between one or more of the defendants and Wayne Dailard, to unreasonably restrain interstate commerce in so-called 'name' bands, as alleged in the complaint and the amended complaint, and to the injury of plaintiff"—to the injury of "plaintiffs." There are now two.

"2. The actual restraint of interstate commerce in so-called 'name' bands as a result of such agreement, combination or conspiracy.

"3. Injury to plaintiffs which resulted directly from acts committed by one or more of the defendants pursuant to such agreement, combination or conspiracy; and

"4. Injury to plaintiffs of a kind and extent which can be measured in money, and is not determined merely by conjecture, speculation or guesswork.

"You may not presume that the defendants, or any of them, are liable to the plaintiffs in this action merely because the plaintiffs have filed a complaint, or an amended complaint, charging that the defendants have engaged in a combination and conspiracy to restrain interstate commerce in so-called 'name' bands. The defendants, and each of them, are [1468] presumed to have conducted themselves and their business in a lawful manner until the plaintiffs prove to the contrary by a preponderance of the evidence.

"Evidence has been presented to show that Music Corporation of America is one of the so-called 'big four' booking agencies or personal service organizations which today represents band leaders throughout the country.

You are instructed that such evidence, standing alone and in and of itself, is not proof of any violation of the Federal anti-trust laws.

“During the course of the trial, frequent reference has been made to the American Federation of Musicians, which has been referred to as a labor organization and as the ‘Musicians Union’. The American Federation of Musicians is not a defendant and is not on trial and its policies and practices are not issues in this case. Therefore, you shall not permit any sympathy or prejudice toward American Federation of Musicians to influence your consideration or decision of this case.

“A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

“To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express [1469] or formal agreement for the unlawful venture or scheme with which such persons are charged, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design with which they are charged. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the

unlawful scheme, if any there is, every one of said persons becomes a member of the conspiracy.

“Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, [1470] assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

“Mere knowledge alone does not make one a member of a conspiracy, either knowledge of the existence of the conspiracy or knowledge of the commission of overt acts or even participation in an overt act, but there must be membership in the unlawful combination by aid, assistance or tacit understanding.

“Certain testimony has been admitted concerning alleged activities and statements of Wayne Dailard, whom plaintiffs allege to be a co-conspirator, but who is not

named as a defendant in the suit. Evidence of these alleged activities and statements, in and of themselves, are not to be considered by you as evidence establishing the conspiracy alleged in the complaint or amended complaint, but such alleged conspiracy must be established, if at all, by other evidence, and must be found by you from such other evidence to have existed at the time of such alleged activities and statements before you would be authorized under the law to consider them in connection with the other evidence.

“During the course of the trial the court dismissed this action as to Jules C. Stein personally. The fact that Jules C. Stein is no longer a defendant in this action is not a fact from which you may draw any inference as to the liability of the defendants who remain” in the trial. “You are not permitted to infer from this fact that the defendants who are still in the case are liable to the plaintiffs.

“The defendant, Music Corporation of America, is a corporation and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the defendant, Eames Bishop, is and was an agent of the defendant, Music Corporation of America, and that the defendant, Lawrence Barnett, is and was an agent and officer of the defendant, Music Corporation of America, and that their acts and actions in conjunction with transactions involving Pacific Square Ballroom and Mission Beach Ballroom at San Diego, California, were performed by them while acting within

the scope of their authority as such agents. Thus, their conduct, and the conduct of each of them, shall be deemed by you to be the conduct of the corporation, Music Corporation of America. [1472]

“Before you may return a verdict against any defendant you must find that he was a party to a combination, agreement or conspiracy to restrain interstate commerce in so-called ‘name’ bands, and you must further find that Wayne Dailard was a party to such combination, agreement or conspiracy. Depending upon your findings, you may return a verdict against one or more defendants, and in favor of other defendants. In other words, you may return a separate verdict as to any defendant.

“The plaintiffs charge that defendant, Music Corporation, has with Wayne Dailard conspired to monopolize trade and commerce in so-called ‘name’ bands. In the eyes of the law and for purposes of applying the Federal anti-trust laws, the expression ‘to monopolize trade and commerce’ means ‘to control it, to exclude others from trade in commodities in such commerce and prevent them from dealing therein in a free market.’

“A combination which unreasonably limits competition, which would otherwise exist between persons in similar businesses, is illegal.

“The defendant, Music Corporation of America, had a legal right to deal exclusively or preferentially with Wayne Dailard, so long as it did not do so for the purpose of unreasonably restraining or monopolizing interstate commerce in so-called ‘name’ bands pursuant to a combination or con- [1473] spiracy.

“The rule that a trader engaged in entirely private business may freely exercise his own independent discretion as to parties with whom he will deal, is subject to condition that a particular method of doing business must not run afoul of the anti-trust laws of the United States.

“The written agreements between Music Corporation of America and Wayne Dailard, which have been introduced in evidence in this case as Defendants’ Exhibits, numbers E and F, in and of themselves are lawful agreements which the parties had the right to make and to perform.

“If you find that the written agreements in evidence between Music Corporation of America and Wayne C. Dailard represent the entire understanding between the defendants, or any of them, and said Wayne Dailard, respecting the matter of providing bands and musical entertainment at San Diego; and if you further find that there was no other contract or agreement and no combination or conspiracy between the defendants, or any of them, and said Wayne Dailard, as charged in Plaintiffs’ complaint and in Plaintiffs’ amended complaint, then you cannot find for plaintiffs, unless you find from a preponderance of the evidence that the defendants and said Wayne Dailard made and performed said agreements with the intent and for the purpose of restraining or monopolizing interstate commerce in so-called ‘name’ bands. [1474]

“The primary object of award of damages in a civil action—this is a civil action—is just compensation, indemnity or reparation for pecuniary loss, if any, that results to plaintiffs directly or proximately from unlawful conduct on the part of defendants, if any.

“In a suit under anti-trust laws for claimed loss of profits if fact of damages is proved, the amount may be reasonably approximated where based upon competent evidence.

“Evidence has been presented in this case which indicates that the plaintiffs have set up and maintained a set of bookkeeping records covering their operation of the Mission Beach Amusement Center, and that these records list the ballroom income and expenditures separately from the income and expenditures relating to the concessions and other operations of the Amusement Center. In the event that you should find it necessary to decide any issue which requires you to consider these bookkeeping records, you are instructed that you are not bound by the bookkeeping methods used by plaintiffs and you are not required to treat ballroom income and expenses separate or apart from other income and expenses of the Amusement Center as a whole. It is a question of fact solely for you to determine whether the ballroom and the various concessions were operated by the plaintiffs as one enterprise, and whether the expenses shown on the records were necessary, proper, reasonable, and actually incurred. [1475]

“In the event you find it necessary to consider the issue of damages, you are instructed that in an action of this character under the anti-trust laws, the recoverable damages, if any there be, are only those sustained by the plaintiffs from the time the cause of action accrued up to the time suit was brought. Damages, if any, which accrued after the suit was brought are not recoverable in the action unless they are shown to be the result of acts done before the suit was commenced. There is no

claim by plaintiffs that any cause of action accrued prior to the date on which they commenced to operate the Mission Beach Amusement Center and Ballroom, which was February 3, 1945, and the records of this Court show that their suit was commenced on March 20, 1945.

“In an action for damages as a result of a conspiracy by defendants in violation of anti-trust laws, verdict for plaintiffs, if the jury so finds from the preponderance of the evidence, should be for the actual damages sustained, if any, and the amount of actual damages, if any, must then be trebled so that two-thirds of damages will be the penalty.

“In determining the liability, if any, or the amount of damages, if any, of the defendants, or any of them, to the plaintiffs, you should not give any consideration whatever to any evidence which has been introduced in this case relating to the financial worth or wealth of Wayne Dailard. You are instructed that Wayne Dailard is not a defendant in this [1476] action and you cannot award any judgment against him, and his financial worth or wealth has no relationship to the liability, if any, of the defendants, or any of them, and cannot be considered in determining the amount, if any, of the judgment to be awarded in this case.

“In considering the question of damages or the amount of liability, if any,—I want to state there, ladies and gentlemen, in amplification of that statement, and also in amplification of the question of what the court has termed “liability” as distinguished from what the court has termed “damages,” that they are not the same, they are not synonymous matters. You are so instructed. What the court means and what the law states is that so far as

liability in a tort action is concerned it is the obligation to respond for acts done, whereas damages are the pecuniary estimation of the amount of detriment that has been sustained by reason of such wrongful acts, if any.

I will reread that statement, with that amplification, which is also a part of the instructions given:

“In considering the question of damages or the amount of liability, if any, of the defendants to the plaintiffs, you shall not permit yourselves to be influenced by and you shall give no consideration whatever to evidence relating to the financial position or worth of Music Corporation of America or any of its officers or employees, including the individual [1477] defendants” in the case. “In the event, but only in the event, you should first determine that the defendants have conspired or combined to restrain or monopolize interstate commerce in so-called ‘name’ bands shall you consider the question of damages. Thereafter shall you consider the matter of damages, and in so doing you shall award damages only if you find that plaintiffs have suffered loss of profits in the operation of the Mission Beach Amusement Center as a direct result of a combination or conspiracy or unlawful agreement among the defendants and Wayne Dailard, the purpose of which was to unreasonably restrain or monopolize interstate commerce in so-called ‘name’ bands, and in that event you shall consider only such losses of profits, if any, as have been shown by a preponderance of the evidence in the case to be directly and proximately attributable to said conduct of the defendants and in a definite, ascertainable amount.

“Evidence has been introduced for the purpose of showing that during the operation of the Mission Beach

Amusement Center by Wayne Dailard drunkenness, immorality and unsanitary conditions were permitted to exist and that the City Council of San Diego declined to renew his lease because of these conditions.

“Even if you find this to be a fact, you are instructed that no evidence has been introduced to show that the defendants, or any of them, acting in concert, combination or [1478] conspiracy with Wayne Dailard were responsible for any of said conditions. Therefore, in deciding the question whether the defendants have engaged in an unlawful combination, agreement or conspiracy you shall disregard entirely and completely the evidence which has been introduced concerning unsatisfactory conditions at the Mission Beach Amusement Center during the time it was operated by Wayne Dailard. Such evidence is to be considered solely on the question of damages, and then only if and when you find from a preponderance of the evidence that defendants, or one of them, is proven to have violated the anti-trust laws of the United States, as I have stated such laws in these instructions.

“The fact that I have or may instruct you upon the rules governing the measure of damages is not in any wise to be taken as an indication upon my part that I believe, or do not believe, that the plaintiffs are, or are not, entitled to recover damages, for you are the sole judges of the facts. Such instructions are given you solely to guide you in arriving at the amount of your verdict in case you find from a preponderance of the evidence that the plaintiffs are entitled to recover. If from the evidence and instructions I give you, you should find that the plaintiffs should not recover, then you are to disregard entirely the instructions which I give you governing the measure of damages.

When you retire to the jury room, ladies and gentlemen, [1479] you will choose one of your number to act as foreman, and will then proceed to deliberate carefully, cautiously, dispassionately and impartially upon all of the evidence, apply the law which the court has given you in these instructions and throughout the case in its instructions to you.

“When you shall reach unanimous agreement, that is to say, when each and every one of you shall agree upon a verdict, you will have that verdict reduced on one or the other of the blank forms which the clerk has prepared for your convenience only; have it filled out in accordance with your unanimous findings at the appropriate places and spaces by the person whom you choose as foreman, have it dated in the appropriate place, and return into court with the signed verdict.”

That is the charge to the jury. Is there anything further now, Mr. Foreman, that you think of?

The Foreman: I think not, your Honor, unless some of the jurors have some questions to ask.

The Court: If the court can clarify any question, ladies and gentlemen, of course, that is what it is here for. You must not hesitate to ask the court to do so, and if it is a matter which would be improper for the judge to state, I will have no hesitation in telling you so, but I don't want you to be restrained at all from asking for a clarification of any matter that is involved in the case.

(No response.) [1480]

The Court: Apparently there is no such request. You may retire, ladies and gentlemen, or, before you retire, are there any exceptions to the charge?

Mr. Warne: May we approach the bench, your Honor?

The Court: Certainly.

(Thereupon the following proceedings were had outside the hearing of the jury.)

Mr. Warne: Solely for the purpose of preserving a record at this time, may we again object and except to the giving of any instructions requested by the plaintiffs, to which objections heretofore have been urged, upon the grounds stated and urged in our objections, and, further, that we except to the instructions given by the court and not specifically requested, other than the amplification on the occasion of the rereading here today; and that we except to the refusal to give such instructions as were requested by the defendants and which were refused by the court. Further, that we except to the refusal of the court to consider, in the present state of the record, the additional instructions requested, and each of the separate and additional instructions, and ask for an exception as to each of the separate instructions, as proposed, and to the whole of them.

Mr. Christensen: I have no exceptions. I think they are eminently fair.

The Court: The record will show that these objections [1481] and the exceptions are being stated without the hearing of the jury. Both sides will agree to that?

Mr. Warne: Yes, your Honor.

Mr. Christensen: Yes, your Honor.

The Court: The record will show the objections and exceptions.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: Now, ladies and gentlemen, it is about time for lunch, but you had better go upstairs and you will hear from me later.

(Whereupon, at 11:58 o'clock a. m., the jury retired for further deliberations.) [1482] .

Los Angeles, California, Friday, February 15, 1946.
3:00 P. M.

The Court: The record shows that all the jurors are present. Is that correct, gentlemen?

Mr. Christensen: That is correct, your Honor.

The Court: What do the defendants say?

Mr. Warne: Yes, sir.

The Court: Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

(Thereupon the verdict was handed to the bailiff, and by the bailiff to the court.)

The Court: Read the verdict of the jury, Mr. Clerk.

The Clerk: Title of the court:

"Larry Finley and Mariam Finley, Plaintiffs vs. Music Corporation of America, a Delaware corporation; H. E. Bishop; and Lawrence R. Barnett, Defendants. No. 4328-M-Civil.

"VERDICT OF THE JURY"

"We, the Jury in the above-entitled cause, find in favor of the plaintiffs, Larry Finley and Miriam Finley, [1483] and against the defendants, Music Corporation of America, a Delaware corporation, H. E. Bishop and Lawrence R. Barnett, and assess the damages in the sum of \$55,500.00.

"Dated: Los Angeles, California, February 15, 1946.

"A. W. Hudson
Foreman of the Jury."

The Court: Ladies and gentlemen, is that your verdict? So say you one, so say you all?

Jurors: We do.

The Court: The verdict being complete, file it, Mr. Clerk, and judgment will be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Ladies and gentlemen, you are discharged from further consideration of this case. I want again to express our gratitude to you. It has been an ordeal, I am sure. It was a long case, complicated factually, and took up a lot of your time. You came here and patiently listened to it, and conscientiously decided it, I am sure, so you are entitled to the gratitude of the court, and I, therefore, express it to you.

I believe this also completes your term of service. I am very sorry that we will not have the pleasure of your association for some time, at least, but I am sure that your names will go back in the box and hope that we may see you again [1484] some day.

(Whereupon, at 3:05 o'clock p. m., the jury was excused.)

The Court: Gentlemen, the jurors having gone now, I want to say that before the entry of the judgment there is this matter of the costs and attorneys' fees that will have to be arranged. I haven't any idea as to the extent of the legal services, except such as the court is cognizant of by the appearances in court and the taking of the depositions.

I think that counsel for the plaintiffs should prepare a petition, the same as would be applicable in receivership cases or in probate cases in the State Court, setting out specifically the items of service that it is claimed have been performed, serve it upon the other side, and—first, how long do you think it would take you to prepare such a statement, Mr. Christensen?

Mr. Christensen: May I have five days, your Honor?

The Court: Oh, yes, five days. And then the defendants may have five days thereafter, if that would be sufficient, or more if you think it is necessary, in which to consider the application and to file such objections, if you have any thereto, and then we can set the matter down for hearing.

Mr. Warne: I believe, your Honor, there is an intervening holiday in the second five-day period suggested, in which event I suggest that it be a period of eight days.

Mr. Christensen: Could we say five judicial days each? [1485]

Mr. Warne: Well, let's make it a date certain. Then there will be no question about it.

The Court: Today is the 15th. Five days from today would bring it up to next Wednesday. I think probably if you filed it by Thursday, that would be satisfactory. That would be the 21st. The next day is a legal holiday, so suppose we say that the objections are to be filed by Monday, March 4th, by 5:00 o'clock on that day. Then as soon as they come in I shall examine the two documents, and if I consider it necessary, set the matter down for hearing.

Mr. Warne: Now, may I make this additional suggestion, and request this additional action: that the order directing the entry of the judgment in the action, which your Honor directed from the bench,—that that order be vacated and that final judgment not be entered until your Honor has made the ruling and order which is here contemplated.

The Court: I already directed the clerk to enter it under Rule 58. Let me see the rules, please, Mr. Clerk.

(The document referred to was handed to the court.)

“Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk.”

Of course, the clerk could not enter it forthwith because the judgment includes the attorneys' fees and the

costs, and in this particular case those items will have to be carefully [1486] considered and determined, so that the entry of the judgment will be stayed at this time, and if we get those petitions and objections by Monday, March 4th, we will stay the entry at this time to and including March 6th, 1946. By that time the court will have determined whether or not it will be necessary to have a hearing on the petition for attorneys' fees, and if it is, we will accordingly extend the time for the entry of the judgment until such time as those matters are definitely adjudicated.

Mr. Warne: May it be stipulated further, and perhaps the rules take care of this in Federal Courts, that any execution on the judgment be stayed until ten days after the determination of any motion for a new trial.

The Court: Yes, I think that is usual and customary.

Mr. Christensen: I have no objection.

Mr. Warne: And until the ruling on that and any other motions which are made coincident therewith, that is, such as a motion for a verdict notwithstanding the judgment.

The Court: So ordered, unless there is an objection.

Mr. Christensen: No, I have no objection, your Honor.

The Court: I want to express the court's gratitude to all of you, counsel. The case, I think, has been well tried and counsel have been very courteous to the court and to each other.

[Endorsed]: Filed March 15, 1946. [1487]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * * * * *

Los Angeles, California, Friday, September 28, 1945.
10:00 a. m.

The Court: Proceed.

(Cause called by the clerk.)

Mr. Warne: Ready for the defendants, with this provision, your Honor: Certain depositions, particularly three depositions, were taken by the plaintiff of officers of our corporation. The originals of those depositions were handed to the court reporter for certification and filing on Wednesday of this week, with the request that they be filed prior to today. I talked to the court reporter just a few moments ago and he said they were still on his desk and he would bring them right up here. We have conformed copies in the event it is necessary to use them, and we believe perhaps it will be with reference to some of the issues presented.

Also, if the court please, we have prepared and handed counsel a memorandum, purely in an attempt to suggest the issues presented. I am handing two copies to the clerk for your Honor.

The Court: Who is appearing on the other side?

Mr. Rau: The plaintiff is here, your Honor, by his counsel, Desser, Rau & Christensen, by myself, Jack Rau.

The memorandum which Mr. Warne referred to was handed to me just a moment before it was handed to the court and I have not had a chance to examine it as yet.
[2]

The Court: The court has not had an opportunity until this moment to see the memorandum. I think the court should state certain of the matters to be explored at this time, as well as the issues to be clarified.

The first matter of inquiry to be made is with respect to the jury. What is the situation with respect to a jury trial?

Mr. Rau: Plaintiff will request a jury, your Honor.

The Court: The case will be tried in San Diego instead of Los Angeles.

The next matter is the matter of interrogatories propounded by the defendants to the plaintiff.

Mr. Rau: Yes, your Honor. Those interrogatories were answered, that is, the interrogatories that were not withdrawn. We served a notice of a hearing—I believe it is on your Honor's calendar for next Monday—objecting to certain interrogatories. Defendants withdrew the interrogatories to which we objected and required us then to file our answers within the time allowed by law, which expired yesterday. Our answers were filed yesterday. Mr. Finley, the plaintiff, has been in the East, as I believe one of the members of our office advised you, and he returned Wednesday afternoon; so we spent all day yesterday getting the interrogatories answered, getting the originals filed yesterday and the copies served on counsel. [3]

The Court: I assume, then, that this notice of motion and motion which were noticed for Monday, October 1, 1945, has become *functus officio* and may be so regarded by the court; is that correct?

Mr. Rau: That is correct.

The Court: The record may so show, Mr. Hansen.

Let us now go through the allegations of the complaint and the answers that have been filed in somewhat of a summary way.

Mr. Warne: May I make a suggestion?

The Court: Mr. Warne.

Mr. Warne: On pages 6 and 7 of this memorandum, your Honor, we point out what I believe to be essentially the only issues that are presented. I am going to invite your Honor's attention to those—there are really five—on pages 6 and 7 of that memorandum.

The Court: The reading of this memorandum refreshes the court's recollection as to the matter which it desires to interrogate counsel about, and that is this matter of damages: How plaintiff expects to establish the damages which he has alleged in his complaint. I will direct that inquiry to counsel for plaintiff.

Mr. Rau: The records of the former operation of Mission Beach by Mr. Wayne Dailard indicate that he made profits of somewhere in the neighborhood of \$170,000, according to the [4] information given to me by Mr. Finley, during the last year of his operation. Mr. Finley tells me that he did not think a great deal of Mr. Dailard's operation and believed that he could improve upon it and double his earnings from that operation.

Mr. Finley has a three-year lease, commencing the first of January, 1945, for all of 1945, '46 and '47. If his estimate is correct, that with his more efficient operation he could double the earnings of Mr. Dailard, then he would earn approximately \$350,000 a year, or slightly in excess of \$1,000,000 over the period of the lease.

Now, the fact is that due to his inability to obtain the ace attractions for the ballroom, he has not been able to earn that profit. The ballroom itself is the principal attraction, the principal drawing card at any amusement beach. It is the attraction which draws the greatest number of people. Because of the great numbers of

people coming to a ballroom and spending their money not only there but in the concessions and other places of entertainment and amusement in the amusement park, that is what makes the park profitable.

I do not know how familiar your Honor is with the operation of amusement parks, but the concessions, various games of skill, and rides and that sort of thing are operated by what they call concessionaires. These concessionaires pay a minimum guarantee, a flat amount per month for their season; [5] and, in addition to that, they pay a percentage of their gross boxoffice take. If you can attract great numbers of people to the park by virtue of a name band in your ballroom, then the take of the concessionaires is greater and the percentage which they pay to the operator of the park is consequently greater.

The gist of this action is the failure of the plaintiff to obtain so-called top-flight or ace attractions for the ballroom, that is, the big name bands which are controlled by the defendant M. C. A. If he had been able to do so, in his opinion,—and he is practical and experienced in these matters—he would be able to double the profit made by Mr. Dailard in Mr. Dailard's operations, in the past years. That is the basis of Mr. Finley's claim to damages of \$1,000,000.

Mr. Warne: If the court please, may I invite your Honor's attention to the answer to the interrogatory made by Mr. Finley? There was an interrogatory addressed to that subject. It is at page 10 of the answers to interrogatories, being answer to Interrogatory XVI.

Mr. Rau: Interrogatory XXVI, I think, your Honor.

The Court: XVI?

Mr. Warne: Oh, I am sorry. It is XXVI.

The Court: A portion of that, commencing on line 24, page 10, of the answers to the interrogatories is just a reiteration of what counsel stated. [6]

Mr. Warne: Yes. Well, I merely wanted to—may I inquire of counsel one question, your Honor?

The Court: Yes.

Mr. Warne: In this it is not contended that Mr. Finley purchased this lease from Mr. Dailard?

Mr. Rau: No, not at all. Mr. Finley acquired his lease by bidding for it to the City Council of San Diego. The City of San Diego owns this park. Mr. Dailard was a former lessee and he bid in competition with Mr. Finley to retain the lease and Mr. Finley was the successful bidder.

The Court: What is the basis for the application of previous earnings at other places to the amusement center which is the subject matter of this case?

Mr. Rau: We are not applying earnings at other places, your Honor, but applying earnings at the same place. Mr. Dailard, who, I advised the court, earned \$170,000-odd during the last year of his operation, earned that at the Mission Beach Amusement Park. You see, he was the former lessee. His lease expired at the end of December, 1944.

Now, that is a fair basis of comparison. The earnings at the same amusement park during 1944 would form a proper basis for comparison for the potential earnings for 1945 at the same place, and '46 and '47.

The Court: Assuming that conditions were the same.

Mr. Rau: Yes. If we have more efficient management and [7] we can establish more efficient management, then we are entitled to prove that we may have earned more.

The Court: How are you going to establish, to the necessary degree of certainty, in an action at law a more efficient management at a time when the individual who is the subject of the inquiry was made manager at such a time?

Mr. Rau: By comparison, your Honor.

The Court: How are you going to compare in a factual way without getting into the realm of speculation?

Mr. Rau: By showing the improvements that Mr. Finley made in the existing structures there, making the premises more attractive to the public, compelling the concessionaires to reduce their prices, which in past years had been quite exorbitant, thereby attracting greater crowds because of reduced prices—I think that would be quite a considerable factor in itself—and by installing additional safety devices, more guards, protection for the public as well as for the concessionaires, and things of that nature.

I think the court will recognize when we introduce evidence of all the things that have been done down there to improve the management, to make more efficient the operation, that there has been a change over the previous operation of the park.

The Court: That will all be capital investment. Now, how are you going to supplement that other than by so-called [8] opinion evidence as to what the results will be of that?

Mr. Rau: I do not think it can be supplemented, your Honor, other than by opinion evidence, by the opinions of persons qualified to testify as to what such improvements would do in the operation of amusement parks. There are such operators not only locally but elsewhere on the Pacific Coast who recognize from experience what

certain improvements will do to improve the efficiency, to improve the management, and create greater drawing of crowds thereby.

The Court: In other words, you take the position that this case is on a parity as far as the principle of prospective profits or anticipatory profits may be concerned with employment contract cases?

Mr. Rau: Yes.

The Court: Where is there any basis in the decisions for anticipatory profits in a case of this kind where you depend upon what a person thinks will be the result?

Mr. Rau: Where there is a record of past experience.

The Court: Past experience of persons who were operators of this specific park?

Mr. Rau: Of this specific place.

The Court: But I understood you to say that you expect to elicit from such persons only the fact that they had made \$100,000 a year?

Mr. Rau: \$170,000, I think it was. [9]

The Court: Now, you add to the capital investment these various items that you mentioned, increasing available concessions and recreational facilities, rather, broaden the facilities, how are you going to establish to any degree of certainty that the difference that would result, the gross earnings or the net earnings that would result, would be a proper measure of damages?

Mr. Rau: May I counter your Honor's question with a supposition in the form of a question?

The Court: Yes.

Mr. Rau: Let us assume that the manager of the Lick Pier at Ocean Park were brought down to the court

to testify before you; suppose he were to testify that at a certain time, as manager of that amusement center, he did certain things which would be comparable to the steps which Mr. Finley took at San Diego, and that, in his opinion, as a direct result of the things he did, the improvements he created, the additional facilities he put in, the business was doubled, trebled, quadrupled, or what you will; just supposing now we are taking a hypothetical situation, I think that would be evidence upon which the court could justify the findings that the doing of the same things in a similar amusement park would produce the like results.

The Court: In your hypothetical question you mentioned the same place, didn't you? [10]

Mr. Rau: No, I didn't. I said, suppose that Mr. Jones or Mr. Smith were manager of the amusement park here; he had done the same thing at Lick Amusement Park that Mr. Finley had done out at Mission Beach Amusement Park, and the result of what he did was to double or treble the business; I think that would be a reasonable ground upon which your Honor could find that the doing of the same things by Mr. Finley at Mission Beach Amusement Park would have the same result.

We are dealing now in the realm of expert testimony.

The Court: You do not think that the applicable area of patronage and the general environmental aspect of the area is an element that would tend to upset the comparison between the Lick Pier in Venice, in Los Angeles County, in a higher and more thickly populated area with similar entertainment at Mission Beach?

Mr. Rau: A comparison would favor Mission Beach, your Honor, because a proportionate growth of population there has continued.

The Court: I am not speaking of the proportionate growth of population. I am speaking about actual facilities for the purpose of enhancing an entertainment project.

Well, I am just suggesting to you what is in the mind of the court, that your measure is speculative.

Mr. Rau: I gather that from your Honor's remarks. I think I can overcome that at the time of the trial. I think [11] I can produce concrete evidence, perhaps based upon opinion evidence, but of experts, which will create a firm foundation upon which your Honor can predicate a proper measure of damages.

The Court: How many experts are you going to call and who are they?

Mr. Rau: Oh, I am not prepared to answer this question. Mr. Finley has spoken to a number of people, some of them in the East, and, as I have advised Mr. Warne before your Honor took the bench, I am going to have to take some depositions back East.

The Court: We are going to limit the number of experts in this case.

Mr. Rau: As to total number, your Honor, or as to each particular phase of each particular issue?

The Court: We are going to limit it as to the total number of experts giving opinion evidence on all phases. The court must place a limitation if we get to trying a case like they try it in a board of directors' meeting, which we are not going to do at all.

Mr. Rau: One particular issue, your Honor, is the definition of "name bands," so-called big name bands.

The Court: As to matters of that kind, of course, I think you would be able to agree, gentlemen.

Mr. Rau: No, we can't. Our opinions vary. [12]

The Court: Why can't you?

Mr. Rau: Well, Mr. Warne and I have never tried to discuss it between ourselves, but in the taking of the depositions that have been taken, both Mr. Warne and I have been the examiners in each case and his questions and my questions and our various objections indicate we do not agree.

The Court: I do not see why, if there are criteria in this line of entertainment and activities, the lawyers cannot agree upon a definition. Of course, if you leave it to your litigants, you will never agree on anything. They would not be in court if they could agree.

Mr. Rau: My suggestion, if it is agreeable to Mr. Warne, is that we leave it to three experts: One of the high officials, preferably, of the American Society of Composers, Authors and Publishers—so-called Ascap—which has a great deal to do with the music and entertainment industry.

The Court: I know a great deal about them.

Mr. Rau: And the second might be, conceivably, the editor of the band section of Variety weekly newspaper, and very possibly the editor of the band section of Billboard weekly newspaper. All three I would be willing to stipulate would be qualified experts.

The Court: That is going to save a tremendous amount of time, Mr. Warne.

Mr. Warne: First, on this disagreement, I don't know. [13] I asked no questions on the disagreement.

Mr. Rau: No. You cross examined.

Mr. Warne: I cross examined. I did not cross examine on the depositions in reference to this matter of name bands. I do not believe there is any serious conflict. I believe that the statement with reference to name bands, as made by our own client as the President of Music Corporation of America, is a fair statement.

I have no objection to a procedure where we could agree upon experts to define "name bands", assuming that that gets to be material. However, the three who are suggested, I think leaves out the most important of all material, the American Federation of Musicians—those are the men who play—plus the fact that a band leader himself, it suggests itself to me, someone like Kay Kayser who has been and has grown to be a name band, and if anybody knows the field he probably does. I do not think we would disagree particularly on choosing some experts.

The Court: I do not see why we should find it either proper or necessary to take up the time of the jury listening to a lot of fellows and girls to probably come up here and tell us what they think of such and such a band.

Mr. Warne: I am in agreement with your Honor.

The Court: It does not help us at all. It just simply confuses the situation before a jury. [14]

It seems to me that the lawyers themselves—and I know that each of you understand the case in principle—should be able to get together and agree upon either the panel of three persons or one person.

I would think, if there were some recognized personality in the industry itself, that might be a solution. We tried a case some time ago that involved this question,

under the Social Security Act, whether a man who had a band—I will call them leaders for want of a better definition, and I am not speaking technically in that respect—but we felt after that case that the best authority in nomenclature was found in those associations who play the instruments, the musicians themselves in their trade organizations I mean. If there is some outstanding person—

Mr. Rau: Mr. Petrillo is the President of the American Federation of Musicians, your Honor.

Mr. Warne: I would agree on Mr. Petrillo. I don't know him.

Mr. Rau: I would not agree upon Mr. Petrillo. I rather hesitate to make a statement at this time as to why I would not, but I would like to assure the court that there is a very good reason why Mr. Petrillo would not be acceptable as the person.

The Court: Who would you suggest?

It would be better to have one person, because, in these [15] artistic matters if you get a panel of three—it is a highly emotional activity, you know as well as I—

Mr. Rau: Yes, sir.

The Court: —and they have very pronounced views and it is hard to manage them so that they can reach an agreement. If you could choose one person it would be better.

Mr. Rau: Either the head or a high executive of Ascap.

Mr. Warne: With reference to Ascap, Ascap has to do only with composers. They have nothing to do at all with bands.

The Court: We have had some musical scores here in cases in which the entity known as Ascap has been mentioned.

Mr. Warne: That is right. They are the organization of authors and composers, and they deal in their business and their officers deal with the interests of composers who write music.

May I suggest another name here of a man—again, I do not know personally—and that is a member of this Bar, a Mr. Bagley, who is a vice president and the only vice president of the American Federation of Musicians. Now, I do not know him.

Mr. Rau: I was about to say with reference to Ascap that Ascap licenses various places of entertainment to use compositions created by their members. Their license agreement—I have never seen one but I have been informed that this is the fact—contains provisions for license fees [16] predicated upon the category of the particular place of amusement using the compositions, and those categories are determined by the type of musical bodies that the place employs. They are divided into what Ascap calls scale bands, which merely receive the musicians' scale; semi-name bands, and name bands.

Now, I do not know what definitions they place upon those, but certainly they have obviously placed some definition in order to differentiate between the various places of entertainment.

I think that since they have already done so, that may be a good place for us to inquire. Perhaps Mr. Warne and I would both desire to inquire independently of each other there.

Mr. Warne: Yes. I have no objection to making an inquiry. I feel that we can probably arrive at some agreement as to making a selection.

The Court: I assume that you can, gentlemen. I do not see how there can be any question between you as to choosing someone, personally.

Mr. Rau: Will you let Mr. Warne and I try and work that out, then, your Honor?

The Court: Yes; both of you try and work it out, providing you can do it within the next ten days.

Mr. Rau: We will try. [17]

The Court: Very well. Let the record show that the parties agree, through counsel, that there will be one expert for that purpose and the name of the expert will be submitted to this court within the next ten days. Is that satisfactory?

Mr. Rau: Yes, sir.

Mr. Warne: That is all right, your Honor. May I say that my suggestions here are without prejudice to a further matter we want to urge to your Honor, at least, at the conclusion of this pre-trial hearing.

The Court: We are simply covering this matter involved under consideration at this time specifically, not generally.

Mr. Warne: Very well.

The Court: Are there any other phases in which it will be necessary to use experts or call experts?

Mr. Rau: Yes, your Honor. That is on the question of damages.

The Court: On the question of damages.

Mr. Rau: That your Honor raised. That is on the question of damages.

The Court: I think that I should limit that. I think it is about comparable to these land cases we have had a great deal of experience in—the more experts we have, the less certain we can be in the findings.

Mr. Rau: Your Honor, this is the reporter with the depositions to which Mr. Warne referred, so they may be filed. [18]

The Court: So ordered.

It seems to me that if you have not to exceed two experts—I would suggest one on each side—but we will not restrict it further than to say that there shall not be more than two on the question of damages.

On all general questions and specific questions relating to damages, or concerning which the witness is called to testify as to damages or lack of damages, it shall be limited to not to exceed two witnesses on each side.

I would like to hear from counsel for plaintiff, first, an estimate, if you can give it, as to the time that will be required to try this case with a jury.

Mr. Rau: As nearly as I can estimate that, your Honor—and I have thought about that question—I could only approximate that it should take about a week.

The Court: Could you fix a limit a little more definite than that?

Mr. Rau: I think the plaintiff's case should not take over two and one-half or three days. That is the best I can tell your Honor at this time. I am not prepared to make that a positive limit to which I would like to be bound, because of the taking of the depositions which we still have to take and circumstances that may arise.

The Court: Of course we cannot limit litigants to saying precisely one day or two days or three days, but

we think we [19] ought to be able to get from counsel in all cases a reasonable limitation as to the length of time that it may take.

Mr. Rau: Without taking into consideration the time required for the selection of the jury, plaintiff's case probably will not take more than three days. I do not know how long the defendants should take—possibly less than the plaintiff's case; and I do not know what rebuttal will be required. In my opinion, a week or maybe six court days should do it.

The Court: Now, I am going to ask Mr. Warne, for the defense, what his estimate is, assuming that the case goes ahead and that it is not disposed of excepting by hearing before a jury.

Mr. Warne: Yes. My own thought is that it would take at least six and perhaps up to ten court days, your Honor.

The Court: You think ten court days in any event or under any conditions would be sufficient?

Mr. Warne: I would say, ought to be sufficient. Manifestly I cannot anticipate entirely what will be required by way of proof.

The Court: Would you agree to that, Mr. Rau?

Mr. Rau: That ten court days would be a reasonable time; yes, your Honor.

The Court: Would be sufficient time?

Mr. Rau: I think two weeks, that is, ten court days, [20] would be sufficient time, your Honor.

The Court: These depositions, which I notice are quite voluminous here—I have not seen any of them excepting at a distance—is it expected to read any of these depositions to the jury in the trial of the case?

Mr. Rau: These depositions, your Honor, are depositions of Mr. Stein, who was one of the defendants, Mr. Barnett, a defendant, Mr. Bishop, a defendant, and Mr. Howard, an employee of defendant M. C. A. They will probably only be used for the purpose of impeachment. I doubt very much if they will be used to read to the jury.

The Court: Are all depositions taken that will be taken in the case by either side?

Mr. Rau: No. We still have depositions to take, your Honor, and there is one that has been taken which has not been filed as yet because it has not been signed.

Mr. Warne: We would anticipate that there would be no necessity for depositions unless the time of trial is such that some of our witnesses will not be presently available. At the present time we intend to have available witnesses who will be put on the stand.

We are going to take, and have arranged to take and deferred it by reason of Mr. Finley's absence, the deposition of the plaintiff, but not for use upon the trial; that is, we do not anticipate its use upon the trial. It is purely for [21] discovery.

The Court: When is it reasonably certain that all of the depositions which are to be taken or have been authorized to be taken will be taken and completed and filed?

Mr. Rau: I would say within the next 90 days, your Honor.

The Court: And, as far as the defendant is concerned, could you answer that question?

Mr. Warne: I will say that within the same period of time, sir, without question.

The Court: Is the court to gather from that the impression or belief that the case should not be set for trial before 90 days?

Mr. Rau: That is my suggestion, your Honor, if I may be permitted.

The Court: What is your idea on that, Mr. Warne?

Mr. Warne: Well, insofar as the 90-day period, we would be prepared for trial prior to that time, assuming these depositions are in and after we have taken the deposition of Mr. Finley.

We do not know what matters the plaintiff will attempt to produce by witnesses to be taken in the East, as they stated. My thought is that as soon as they are taken, I would say that the case should be ready for trial within 30 days thereafter, without question. [22]

And I would like to say this, also: If there are depositions which are to be taken in the East, in order to expedite it, I am required to go East on the 9th of October and I would like to have them in that following week. I will state that to counsel now, and that I would like his cooperation in having them taken during the period of the week of—this will be the 7th—the week of the 16th of October.

Mr. Rau: I cannot answer yes or no to that question as yet, your Honor. Mr. Finley just arrived back from New York Wednesday. We worked on the answers to the interrogatories yesterday, and he went to San Diego, where he expected to remain all of next week and will return to Los Angeles the following week. I told Mr. Warne generally last night that he could take Mr. Finley's deposition during that following week, when he is in Los Angeles, by stipulation.

The Court: That would be the week of the 8th.

Mr. Rau: That would be the week of the 8th.

The Court: That date would be agreeable to you to take the deposition here?

Mr. Warne: I am leaving on the 9th. I would like to take it this next week if possible.

Mr. Rau: He will be in San Diego next week.

Mr. Warne: He can come up for a day to take his deposition.

Mr. Rau: No. He is going to leave for the East in about three weeks and he has a lot of things to do down there. [23]

The Court: I think we ought to get the case to where it can be tried before 90 days. I do not see why it should take you 90 days.

Mr. Rau: I am leaving sufficient leeway for circumstances which may arise. It should not take 90 days to take the depositions.

The Court: The case should have been filed in the Southern Division. I keep repeating that, gentlemen. I want to impress you that that is where the case should have been filed originally.

Mr. Warne: We did not file the case, your Honor.

The Court: I know you did not. But the clerk did not consult the court when accepting it for filing. If he had done so, he would have been told not to accept the filing for the Central Division. This case was filed on March 20th of this year, and the answer is—

Mr. Warne: The answers were filed not until some-time later, your Honor. The time was extended to file the answer.

The Court: July 2nd one answer was filed. So that here it is September the 28th, 90 days from this time—

October, November, December—that will take almost nine or ten months. That is a long time.

Mr. Rau: I was going to suggest, if I may, that it be set in January so that we do not have it coming during the Christmas holidays. [24]

Mr. Warne: That would be satisfactory, I think, having in mind the fact that some of these witnesses or a number of them are engaged in the amusement industry and there is always a Christmas-time extra activity in amusements.

Mr. Rau: January would be a very satisfactory time for the witnesses; I know that, your Honor.

The Court: Then it may be set, by consent of all parties, for a day in January?

Mr. Rau: Yes, your Honor; any time convenient to your Honor's calendar.

The Court: The next term in San Diego commences on the second Monday in January; that will be January 8, 1946. Usually on the first day of the term, and probably that week, they will have an accumulation of matters. Suppose we set this case for the 14th?

Mr. Rau: Is Monday a law and motion day in San Diego as well as here?

The Court: No. We have the law and motion day there on the first day of the term usually, and if matters accumulate, we hear them at such times as it may be convenient.

Pardon me, I miscalculated. The 14th is the first day of the term, as well as the second Monday in January. I think we had better put it over until the next week.

Mr. Rau: January the 21st, your Honor?

The Court: Just a second. I am thinking of one or two [25] other matters. I think January the 21st is a more satisfactory date.

Mr. Rau: That is agreeable to the plaintiff, your Honor.

Mr. Warne: As to the date, the date is agreeable.

The Court: By agreement, cause set for trial January 21, 1946, in the Southern Division of this court at San Diego, California, with a jury.

Mr. Warne: If the court please, when saying that that is satisfactory and we are willing to stipulate to it or consent, that is without prejudice to any other motions or applications we may make in the interim.

The Court: Neither side waives any objection other than an application to continue the case.

Mr. Warne: I understand that.

The Court: That is waived by both of you.

Mr. Warne: Yes.

The Court: And it is so understood, gentlemen. That is all that I have, I think, that the court of its own initiative desires to pursue on this pre-trial. It being a jury trial, it is a little more restricted than otherwise it would be. I would explore many of these issues a little more thoroughly if we were not going to have a jury, but I do not want to convert the case into anything but a jury trial, and even the broadest interpretation of Rule 16, the right of trial by jury, should be preserved. I think that we have circumscrib- [26] ed it sufficiently in the matter of expert witnesses and the agreement of counsel to designate some one person within ten days who will act as an expert to describe these bands in their proper nomenclature in the industry, and that is as far

as I care to go. If either of you have any further suggestions, I shall be glad to hear them.

Mr. Warne: If the court please, there are certain matters. But first, I would like to obtain from counsel in connection with this pre-trial hearing a stipulation as to a fact. I have here a photostat of the original bid for the lease of the Mission Beach amusement center, dated October 30, 1944, addressed to the Mayor and City Council of San Diego, and bearing what purports to be the signature of Larry Finley on page 13. I obtained this from the office of the City Clerk in San Diego. I would like to have counsel stipulate that he did file such a bid or application as this is.

Mr. Rau: Mr. Warne showed me this before, your Honor, you took the bench. I have never seen it, so I am not prepared to stipulate that it is a copy of the bid Mr. Finley filed. It does not appear to have been certified as a correct copy by the City Clerk. I do not know.

The Court: May I see it?

Mr. Warne: The red pencil portion is not a portion of it. I put the red pencil portion there.

The Court: There are some phases of it, for instance, [27] on page 1 of this proffered exhibit, which is marked for identification—mark this.

The Clerk: Defendants' A for identification.

The Court: The lines are not numbered, but down about half way, commencing with the third paragraph on that page, which reads thus: "Following are the terms under which I wish to make any bid for the lease.

"1. Agreed as stipulated."

There does not seem to be anything in this proffered document that indicates what is meant by that statement: "Agreed as stipulated."

Mr. Warne: The pertinency of the exhibit does not refer to that portion of the document and our offer of it goes only with reference to another fact or recitation in the document itself.

The Court: The only point in counsel's declination to agree with you that the instrument might be received here for such use as is proper before the jury would be limited to the fact that it is not complete in and of itself; and that is the reason I call to your attention that statement: "Agreed as stipulated." Where is the stipulation and where is the document?

Mr. Warne: Apparently that is a pure recital of the creators insofar as we know. Insofar as the offerer or the bidder is concerned, he may have had private conversation with [28] the City Manager; but we are not concerned with that, nor is it a fact which we will seek to elicit, nor do we offer any part of that—only the portion which is contained as a writing in his bid.

The Court: I think the plaintiff should be required to say whether or not this is his signature, whether or not this is the document.

Mr. Rau: I have not had a chance to examine it, your Honor.

The Court: I am not saying that you should do eo instante, but you should do so within such time as the court thinks is reasonable for you to ascertain the truth. If it is a fact, it belongs in the case. We should not take up the time in a jury trial to lay foundation and hear argument. That is what Rule 16 covers.

Mr. Rau: I know Mr. Finley filed an application with the City Council and I know the senior member of our firm has seen it. I, personally, have not. If I may have an opportunity of showing this to Mr. Desser or Mr. Finley, I will be quite happy to stipulate.

Mr. Warne: May I make a suggestion, your Honor? I have a positive of this photostat and will be glad to submit that to counsel, and then within ten days, if he wishes to enter a denial, he may.

Mr. Rau: Certainly. [29]

The Court: Will ten days be satisfactory?

Mr. Rau: Satisfactory, your Honor.

The Court: So ordered. It is agreed, then, that this proffered exhibit which has been marked for identification will be examined by the plaintiff and his counsel, and that counsel for plaintiff will indicate and file herein within ten days from this date a statement as to whether or not it is agreed that this was the document as suggested by counsel for the defendants; and that thereupon no further proof as to its preparation or as to any foundation for its introduction in the case will be entertained by the court unless it is denied authenticity. It may be filed. That ruling just made I presume is agreeable to both you gentlemen?

Mr. Rau: It is agreeable, your Honor.

Mr. Warne: It is satisfactory.

Now, if the court please, upon the pleadings of the case and upon the answers to the interrogatories as they have been made, received yesterday, and analyzed only in part as yet by ourselves, and under other undisputed facts which are by reference to the answers to the interrogatories established as facts, in our opinion, without any question, no case is made or no proper claim is made

for the maintenance of an action under the anti-trust laws.

I realize that your Honor made suggestion that factual matters here were factual matters which should be tried to a [30] jury. However, I would like at this time and I would, on behalf of defendants at the conclusion of this pre-trial hearing, move the court that under the pleadings, and, as I say, the answers to the interrogatories and the admissions as made by the defendants, that the action be dismissed.

I should like to suggest, your Honor, this: In part, I would like to have the points of this analyzed very briefly as the points which we would like to urge. I would like to also, if your Honor feels that the points have merit—and we believe that they do—be permitted to file a memorandum in support of the application.

First, I would like to have your Honor hear an analysis of the points themselves and we believe, irrefutably, that the points can be made; that there is no case for the plaintiff on the pleadings and on the admissions which he makes in his interrogatories. I would request that, your Honor, at this time.

Mr. Rau: The question of a motion to dismiss the case, your Honor, has been argued before your Honor once already and briefs have been filed and your Honor decided that matter. Mr. Warne says that he proposes to renew his motion upon the pleadings and upon the answers to the interrogatories.

I think such a motion would be premature because plaintiff likewise intends to serve upon the defendants interrogatories which have not as yet been prepared. I think such a motion [31] might conceivably be considered by the court after both parties have served and have

answered their interrogatories. Until that time I do not believe it is a proper motion. I am not even conceding that it would be a proper motion after that time, but in any event I do not think this is the proper time for it.

The Court: We are not going to review the rulings which were made on the pleadings. We are satisfied that they were correct under the state of the record which existed and which now exists under the pleadings.

One of the features of the interrogation of counsel as to how long it was going to take to get all these depositions in was directed to that very phase of the case. I do not think that we should await 90 days' time to get these depositions in. I think we should have the depositions, if they are going to be filed here—and they should be filed if they are taken—within at least 30 days before the date set for trial so the court can go over them; and all of the depositions should be here, filed and completed so that the court may examine them within thirty days, especially where we are going to have a jury. I do not wish the jury to wander off on extrinsic, collateral and immaterial matters. In other words, we are going to keep the case a lawsuit in the Federal Court instead of an atmospheric episode in some other forum.

Those depositions should all be completed and filed at [32] least 30 days before the date which has been set for trial. It would be a lot better to have them here two months before the date set for trial and the judge go over them as he should.

I do not believe I care to hear any argument on the pleadings now as to anything. It would probably save

you time until all the depositions are in. There isn't any factual situation before the court at the present time that was not here at the time that the argument was made on the complaint, except the interrogatories and the stipulations that were made today and these depositions which have been filed today, which the court has not had an opportunity to read at all.

Mr. Warne: That was one of the reasons why I suggested to your Honor, having in mind the answers to the depositions—and I am speaking advisedly now—the answers and admissions in the depositions. I say that those, as related to the issues made by the pleadings—and, your Honor, we do not want to argue again the sufficiency of the pleadings or the sufficiency of the complaint. That is not the purpose at all. It is the fact that this lawsuit, patently, by the answers in the depositions or to the interrogatories made by Mr. Finley, is no lawsuit. As I say, I believe I speak advisedly. We have made considerable research covering the issues in a case of this kind. The interrogatories which we prepared, while not full discovery and not in full length a deposition, [33] we believe puts Mr. Finley in a position where his answers entirely negative any lawsuit on his part in this action.

The Court: I think probably we should await the taking of the deposition of the plaintiff, Mr. Warne. We may be trying the case on one side of the question.

Mr. Warne: I understand.

The Court: These are all depositions on unilateral aspects of the case. If we get Mr. Finley's deposition here—and I understand you are going to be prepared to take it in the next two weeks.

Mr. Warne: Correct. We want counsel to arrange for it.

The Court: Why can't you bring him up here and take that deposition next week?

Mr. Rau: I will try, your Honor. I expect to be talking with him either tonight or tomorrow sometime.

Mr. Warne: I will start taking it tomorrow.

Mr. Rau: I said I expected to be speaking to him tonight. I did not say I expected him to be up here. He was here yesterday. He has been back east for about three and one-half or four weeks and he has great business interests in San Diego, and after that the man has business interests here. The man has just returned and I think he is entitled to devote a little time to his own business interests. I did not ask Mr. Warne for any favors. I served subpoenas upon his witnesses. I am willing to stipulate to the taking of Mr. Finley's [34] deposition, but I suggest it be at a time agreeable to the party concerned, at least, and that would be the following week. That I suggested before I ever knew Mr. Warne was going away. The first I knew that was this morning. I suggested to Mr. Warne last night that the deposition be taken week after next.

Mr. Warne: We could be arbitrary and serve a notice, counsel, and the witness would have to be produced here at an arbitrary time. I am willing to stipulate to any date next week, starting any time, any hour of the day or evening counsel wants.

Mr. Rau: Mr. Warne stated he was leaving Los Angeles on the 9th. I assume he is leaving on the Super Chief.

Mr. Warne: No, on a plane.

Mr. Rau: The depositions, as far as I am concerned, may start at 9:00 a. m., or 9:30 a. m., on Monday, the 8th.

The Court: I think that is fair.

Mr. Rau: Pardon?

Mr. Warne: All right.

The Court: I think that is fair. It is agreed, is it, that this deposition be taken of Mr. Finley on Monday, the 8th day of October?

Mr. Warne: Starting at 9 o'clock, Mr. Rau. OK, 9:00 a. m.

Mr. Rau: Well, I will be there at nine. Mr. Finley is in the entertainment business and he works quite a lot at [35] night.

Mr. Warne: All right; ten.

The Court: Ten o'clock on that date. So agreed, gentlemen?

Mr. Rau: Yes.

Mr. Warne: Yes. It will be at our office.

The Court: So ordered.

When the deposition is taken and filed, I am not going to restrict either of you from interposing any motions which are appropriate. I just want the understanding that there is not going to be any motion entertained, that is, looking from either side, to a postponement of a trial of this case. But any other applicable motion, of course, the court will always be open to entertain, but I think that motion should be deferred until we get the particular deposition of the plaintiff.

Mr. Warne: One other thing in connection with the depositions in the East. I would like counsel's cooperation. I would not like, either myself or to have someone

else, make a separate trip East, because I am leaving on the 9th.

The Court: The following week you suggest?

Mr. Warne: The following week, any time.

Mr. Rau: I don't know, your Honor. I don't know that the witnesses are available. I have to communicate with them and find out. [36]

Mr. Warne: I would like the suggestion that counsel cooperate in an attempt to bring it within that period while I am still in the East.

The Court: He has been quite cooperative.

Mr. Rau: I think I have been too.

The Court: He has been quite cooperative and I think he will continue to be so in order to properly expedite this matter.

Mr. Rau: If it is convenient at all, I will try and accommodate Mr. Warne if I can do so. If I can't, he will simply have to designate counsel from the East to appear, as I expect to have to do myself.

The Court: He will be at a disadvantage if you are there and he is not.

Mr. Rau: Yes. I say, he will have to designate counsel in the East. I do not intend to go back East for the purpose of taking the depositions, unless I have some other business to take me there.

Mr. Warne: There is one other matter, your Honor, on the taking of the deposition of Mr. Finley. I had written sometime ago that he be produced for the taking of his deposition and I requested also that there be produced financial statements, all of which have been out-

lined. You have the letter there, (Mr. Rau). May I see it?

A copy of the lease between Mr. Finley and the City of San Diego; a copy of the bid for the lease; I asked for that [37] also and did not obtain it; originals or copies of contracts entered into by Mr. Finley for amusements for appearance, to exhibit an entertainment at the Mission Beach ballroom from the time he took it over down to this date, together with settlement sheets of accounting insofar as those are concerned; auditor's and accountants' statements, balance sheet, profit and loss statement concerning the operations rendered to or received by Mr. Finley, limited to all financial and money transactions which have occurred in the operation of the Mission Beach ballroom from November, 1944 to this date; November is the time when he obtained the concession; and auditors' statements of similar character covering the profit and loss statements and balance sheet for the operation of the Mission Beach Amusement Park—counsel referred to two entities, namely, the ballroom and the park—together with some other detail of accounting which I have enumerated in a writing handed to Mr. Rau; also the publicity file—ordinarily these operations have a publicity file in which their publicity is kept, copies of their publicity—and I want also copies of correspondence between the Mission Beach ballroom or Finley and Fredericks Brothers, William Morris Agency, and General Amusement Corporation. They are the large agencies who have booked attractions there.

All of this has been covered by specific detailed letter, is all pertinent, I believe, and we would request that those [38] be made available.

The Court: That was written by you to Mr. Rau?

Mr. Warne: Correct; under date of September 7th.

Mr. Rau: I suggested to Mr. Warne, your Honor, that his demands were, in my opinion and the opinions of my associates, much too broad; that I felt the proper thing to be done in the case of the documents, where his demands were as broad as they are, would be to present to your Honor an application for the issuance of a subpoena duces tecum and let your Honor pass upon the pertinency of these various things. That is a matter that may be done very easily and in a very brief time; and if there would not be time to properly get the subpoena served for the hearing of the deposition on October 8th, I would be glad to agree that the time may be shortened for that purpose. I think your Honor should pass upon the application.

The Court: I think that is correct, if you cannot agree as to the materiality or relevancy of some of these matters.

Mr. Warne: May I then limit this, your Honor, at this time and say that all we want on the taking of his deposition at this time is accountants' statements showing a balance sheet, a profit and loss statement, a statement of operations of the Mission Beach ballroom and of the Mission Beach Amusement Park, and from the time that he commenced down to this date. [39]

Mr. Rau: An accountants' statement is pretty broad and it is not the best evidence, your Honor, in the first

place. In the second, I would like to inquire why, if that is all Mr. Warne wants, he attempted to get me to consent to produce all of these other things. I think he ought to submit the application to your Honor.

The Court: You can put that statement in an application for subpoena duces tecum this afternoon and present it to the court.

Mr. Warne: The thought I had in mind, I would like to be relieved of the necessity to find Mr. Finley and serve him with a subpoena. That is the sole matter. I am not concerned with the materiality of it, and I certainly do not want any documents or any papers which are improper.

Mr. Rau: Mr. Finley will be at either one of two places: Either at the Mission Beach Amusement Park or the Trianon Ballroom, San Diego, all this week.

Mr. Warne: May I ask this: Will counsel accept voluntarily, without any copy of the subpoena, as being sufficient for the purpose of making it proper process, and produce the documents accordingly?

Mr. Rau: I think so, your Honor.

The Court: I did not hear that, gentlemen. I was looking at these papers.

Mr. Rau: Your Honor has already pointed out that I have [40] been cooperative, and Mr. Warne is now asking me to accept service of a subpoena duces tecum. I will go that far as well. I think I am being more than cooperative.

The Court: That disposes of it, then.

Mr. Warne: Thank you.

The Court: That is about as far as we can go, gentlemen. And the record will show the agreements as stated by counsel, and that orders are made pursuant to such agreements and in such other matters as the court may deem requisite.

This pre-trial hearing is adjourned, without prejudice to calling it again at the instance of the court.

Mr. Rau: Very well.

The Court: I think the reporter should transcribe his notes, gentlemen.

Mr. Warne: We will want a copy.

The Court: And the court impose it as costs, later, upon the proper party, at the conclusion of the case.

Mr. Rau: Mr. Reporter, may I have a copy?

The Court: The court would like to have a copy, gentlemen, but won't be able to get one unless you gentlemen agree to furnish it.

Mr. Rau: Counsel, will we agree to divide the costs of the copy of the transcript for use of the court?

Mr. Warne: Divide the costs, correct.

Mr. Rau: So stipulated. [41]

Mr. Warne: Yes.

The Court: So ordered.

[Endorsed]: Filed Dec. 7, 1945. [42]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * * * * *

Los Angeles, California, Friday, December 21, 1945.
2:00 p. m.

The Court: I think we might as well call the Finley case. Counsel all seem to be present.

The Clerk: 4328-Civil, Larry Finley v. Music Corporation of America, et al.

Mr. Warne: We are here to attend the conference your Honor suggested relative to this case.

The Court: Gentlemen, the main purpose of calling the conference was to acquaint all of you with the changed condition in the court's calendar. When this matter was before the court originally, it was ascertained that inadvertently it had been assigned to the Central Division, when in fact it should have been a Southern Division case. We proceeded to hear the preliminary motions and matters that were projected in the case here in the Central Division, and in the course of those activities the court indicated, upon ascertaining that a jury would be required, that the case should be tried in San Diego in the Southern Division, and that is still the order.

Now, the situation in the court is this: one of the judges is away and has been away, and probably will be away for some indefinite period in the future. That situation necessitates the judge of this division who happens to be senior in commission in the district, to remain in Los Angeles, [2] if possible, during the month

of January, in order to prepare for the opening of the February term in the Central Division of the court and the attendant empanelment of the jury, grand and trial, and other administrative matters that must be transacted in that time by the senior district judge of the district in a multiple court. I thought I would call this to counsel's attention, and if it is still the joint feeling of all of you that the case could be more satisfactorily tried in Los Angeles in the Central Division of the court than in San Diego, you might respectively submit your views in that regard.

Mr. Warne: Certainly, in the first instance, when it was suggested by Mr. Rau that it was desired to try it here, we stated at that time that it was agreeable to us and that we felt it would be more agreeable to all of the parties and the witnesses, in so far as their convenience was concerned, to try it in Los Angeles, because I believe practically all of the parties defendant live here—they, all of them, I know do live here, and, secondly, the principal office of the company is here and not in San Diego, and all counsel for the defendants live here. We were also advised at that time that Mr. Finley, while he maintained a residence in San Diego, was in Los Angeles most of the time, or at least a good part of the time, and I believe his affidavit has been to that same effect. It is our own view that the case, for [3] the convenience of witnesses, certainly, and counsel, had best be tried in Los Angeles.

The Court: What is your judgment, on behalf of the plaintiff?

Mr. Christensen: It is immaterial to us.

The Court: Well, I would like to have you express yourself on it. Originally, I believe you thought that it would be preferable to have it tried in the Central Division.

Mr. Christensen: Yes, your Honor, and I have no reason to change my mind on that. If, as your Honor appears to have held originally, it should be tried in San Diego, we are willing to have it tried there. If now, for the convenience of the court, it should be tried here, we are perfectly agreeable, and we still believe that it would be more convenient for us. What Mr. Clore Warne has just said is the truth of the matter.

The Court: Then I think we will conclude that the trial be held here, and we will retain the same date, of course, for the trial. I think that was January 21st, was it not?

Mr. Warne: It was set for January 21st. If the court please, in that regard we have just gotten word that one of the witnesses, and one of the principal clients of ours, is required to be in the East, not by reason of any personal business of his, but because of matters involving certain organization work of the American Federation of Musicians, [4] and if a date even a few days later than the 21st of January could be set, that is, that the court could give us such a date, we would

prefer it. The following week would be sufficient, in so far as we are concerned.

The Court: What do you say about it, gentlemen?

Mr. Christensen: I don't think that would seriously interfere with anything that we have scheduled.

Mr. Warne: I am just advised by Mr. Ross here that that situation has obviated itself in the East, so that the 21st will be satisfactory.

The Court: Then let's leave it for the 21st.

Mr. Warne: That is a motion day in your department here, your Honor, isn't it?

The Court: That is true. I set it for the 21st assuming that it would be called in San Diego, so that it will have to go over until the 22nd here. That will be Tuesday. Just let me examine into the matter. Let me have the calendar, please.

(The document referred to was handed to the court.)

The Court: That is Monday. The 21st of January, 1946, is on Monday, so we will not leave it set here on a Monday. We will set it for Tuesday; Tuesday, the 22nd of January. I have a brief calendar here, and I am checking on the day. It will be January 22nd, 1946, at 10:00 o'clock a. m., in the Central Division, at Los Angeles.

Mr. Christensen: Your Honor says "the Central Division." [5] You mean in this court room?

The Court: Yes. Mr. Hansen calls my attention to the fact that there is a case which I have already set

for that day, a jury case. That case should not take over two days, or I think three at the most. The case of Reynoso v. Pacific Electric Railway Company is set for January 22nd, and I don't believe I can displace that case. It is an action for damages for the death of one under an allegation of negligence. It has been on the calendar for some time.

I believe you have said that this case would take two weeks to try. I believe that was your estimate, Mr. Christensen?

Mr. Christensen: I think that is a fair estimate, your Honor.

The Court: And I think you concurred in that?

Mr. Warne: I concurred in that, yes.

The Court: I will have to set it, then, on the 29th. That may congest the calendar here, as I notice we have cases set for February 5th and February 11th, but I think we will reset it for the 29th, January 29, 1946, at 10:00 o'clock, and by consent cause it to be transferred to the Central Division. We will reset it for that date.

Now, while this is not a pre-trial hearing, there are one or two matters which I think I should discuss now, and that is on the issue of so-called "big name bands." I want to know [6] how many witnesses each party intends to call, and if there is no reason why they should not disclose it, to give the names of the witnesses that will be produced to testify on that issue. I will ask the plaintiff first.

Mr. Christensen: I am not prepared, your Honor, to tell you that. You will recall that at the time, of the hearing Mr. Finley had been away. Now, he has been back, and I was with him that day, and I have my next appointment with him on Wednesday, the day after Christmas, and we have had under consideration different persons. I think I indicated to you at the time that we believed that Benny Goodman would be here. I am not certain that he will be. I use that by way of illustration of these people. I don't believe I could answer the question truthfully at this time.

The Court: I think I limited the number to be called on that issue at the first pre-trial hearing.

Mr. Warne: No, your Honor limited the number to be called on the issue of damages. You suggested on this that we try to agree upon a name, but to date we have not been able to do so.

The Court: If the plaintiff is not able to give us that information, I will not require the defendant to do so.

Mr. Christensen: I would be glad to, if I were able to.

The Court: There is another matter I have in mind. I don't recall that there is in the record or in any of the [7] depositions any contract between the Music Corporation of America and any one of the leading bands or band leaders. I don't recall anything in any of the depositions or in the record that disclosed it.

Mr. Christensen: I think there is a form of contract that is attached to one of the depositions. Isn't that right, Mr. Warne?

Mr. Warne: Yes, it is an exemplar form of contract which is used between band leaders and Music Corporation of America, and all other agents, it being a form prescribed by the American Federation of Musicians. The testimony of Mr. Stein was that our company, the MCA, had contracts with a number of band leaders. Also, the testimony of Mr. Lawrence Barnett named a number of band leaders with whom contracts of that character and on that form were made.

The Court: On that form?

Mr. Warne: That is right. There is only the one form permitted, as I understand it.

The Court: That answers it.

Mr. Christensen: The fact that—may I make one comment on that? The fact that it is stated that it is not only with the band leaders and MCA, but with all other agents, should not be construed to mean that we concur that that is the legal effect of the contract, but we simply say that that is the form of contract used by MCA, according to their story, [8] and is attached to one of the depositions.

The Court: Those are the only matters I have in mind, gentlemen. I think now they have been clarified. So we will meet on the 29th to try the case.

[Endorsed]: Filed Feb. 18, 1946. [9]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, Thursday, March 21, 1946.
10 a. m.

* * *

The Court: Primarily, of course, the point to which Mr. Warne has directed his argument I think is covered by the record. The plaintiffs in the amended complaint, and I believe in the original complaint with the single plaintiff, in allegation IX allege as follows, and this is a verified complaint, verified by one of the plaintiffs, Mr. Finley himself:

"IX. Plaintiffs, in order to enforce their rights against the defendants, have employed the services of Messrs. Desser, Rau & Christensen, a firm of attorneys in the City of Los Angeles, State of California, the members of whom are all licensed and authorized to practice before the District Courts of the United States, and under the laws of the United States, to-wit, Section 7 of the Sherman Act, plaintiffs are entitled to recover from defendants a reasonable attorneys' fees, and that reasonable attorneys' fees in this action is the sum of One Hundred Thousand Dollars (\$100,000.00)."

As I say, that is verified by one of the plaintiffs. I may say parenthetically, but seriously, that that is rather [2] an unusually generous allegation for a client to make concerning the value of his lawyers' services.

The petition of counsel, it seems to me, is the more authoritative memorial as to the value of the professional

services. I believe it is in the record that Mr. Finley was not a lawyer. I am not sure, but it seems to me that some one asked him that question in the case.

Mr. Warne: I will stipulate he is not; at least, that he has not been admitted to practice before this court.

Mr. Christensen: I will so stipulate.

The Court: So his statement as to the value of attorneys' fees does not come with the same weight of credibility that a lawyer's testimony would come.

Mr. Warne: May I offer the suggestion there, your Honor: My thought was not with reference to Mr. Finley making a representation to the court. My thought was that any showing in support of it would have been manifestly the showing of counsel. But I do say, and my thought there was, it should be upon a petition; just like in a probate case it would be the petition of the executor to make a petition for payment of his attorneys' fees. I had made the point in the objections, and I felt it only fair to call your Honor's attention to the form of it, inasmuch as we are making a record in the case.

The Court: Even assuming that that would be the position, [3] it strikes me that the amended complaint, and I think the original complaint also, would be tantamount to a petition, because the prayer of the complaint, after alleging that the reasonable value of the professional services to be rendered in the case would be \$100,000.00, is, and the plaintiffs themselves petition, as follows:

"Wherefore, plaintiffs pray judgment against the defendants, and each of them, for the sum of One Million Dollars (\$1,000,000.00) as damages, and that said sum be trebled in accordance with the provisions of Section

7 of the Act of July 2, 1890, 26 Stat. 209; for reasonable attorneys' fees in the sum of One Hundred Thousand Dollars (\$100,000.00); and for costs of suit herein incurred."

I think that is a petition, even assuming that the petition should be made by the plaintiff in the case, by the person in whom is represented the right to commence the suit under the Sherman Anti-trust Act and these other co-operative statutes of the United States with respect to alleging anti-trust activities. So that I think so far as the technical aspects of the matter of the petition coming from the plaintiff is concerned, the plaintiff could not tell us anything further. He said he thought the fees would be reasonably estimated at \$100,000.00. I suppose he estimated that upon [4] what he thought he should recover, to-wit, \$1,000,000.00. Apparently, the jury didn't think he was entitled to recover \$1,000,000.00. They thought he was entitled to recover \$18,500.00, and that under the provisions of the law, not dependent upon evidence, but a mandatory provision in the statute itself, it is the duty of the court to treble that in the judgment. For that reason, on the first phase of the argument, I think there is little merit.

This question of fees, attorneys' fees, is not an easy problem. There are certain guide posts, standards, norms, that have been set up, but even they are variable according to the circumstances of each case.

I am not in agreement with counsel for the defendants that professional legal services can be estimated in the same way, for instance, as for certified public accountants' services. While there is, of course, great technical skill required in many auditing matters, there is also a good

deal of pure mathematics in those matters, purely clerical, or at least mathematical services. Of course, mathematics takes the trained mind, but it isn't the same kind of skill that a lawyer must use in presenting a contested case.

I think there are three or four elements which have been pretty well established by the decisions, the authoritative decisions in the Federal Court. One, and primarily, of course, is the skill that is required in the case. If it is [5] a case in which a lawyer commences a suit, say, on a promissory note, where there is no dispute except perhaps a dilatory plea to delay payment, why, there isn't much skill required there. The pleading is simple, the law is settled, it is a negotiable instrument, it hasn't been paid, it is due, and that is all there is to it. The payee or endorsee is entitled to a judgment for the money. But when you get into the realm of federal cases, and particularly those relating to anti-trust cases, you delve into one of the most intricate branches of federal jurisprudence. The novelty of this case I think illustrates that. This case is by no means a settled case in the sense that all of the principles of the case have been previously adjudicated by the Supreme Court of the United States. We think they have, but that is merely our conception of it. There isn't any guiding star by the Supreme Court that touches the case precisely. So the lawyer in preparing such a case, especially where he is representing a plaintiff, is required to use his skill, not only so far as logic is concerned, but his professional skill in his acquaintance with and familiarity with the decisions of the Federal Courts in these anti-trust cases, and in an effort to bring his case

within the scope of the decisions of the Supreme Court of the United States. That is involved in every one of these cases, and it is more difficult, I think, in a private action, authorized under the provisions of the Sherman Anti- [6] trust Act, than it is in a public case. The government counsel who proceeds against an enterprise under the Sherman Anti-trust Act has considerable in his favor, if he is careful, and they usually are careful. He has the economy of the nation, and if it is brought during times of emergency, he has the environment in which that action proceeds; whereas, where a private litigant is seeking to recover against his competitor or against some one he claims is inhibiting him from engaging in free enterprise, there is the selfish interest that is in the case, and it does affect the environment. I don't think it affects the court consciously, but it does affect the environment of the case and presents a more difficult problem for the lawyer who is seeking to recover the judgment than where the public government attorney is seeking generally to recover an injunction, and sometimes damages also.

Now, the amount of time that is spent, especially where there is a conspiracy alleged as there was in this case, in the conferences that occur between the attorney and his client or clients and others who will be material witnesses, consumes a good deal of time. The voluminous file here indicates the amount of time, and the defendants' counsel kept counsel busy, so far as the application of professional skill was concerned, to get the case into the court so that it could be tried. Counsel on the other side were able, as [7] Mr. Christensen has properly said. They were all experienced lawyers, of eminent

standing at the bar. One of them particularly had been government counsel in anti-trust cases, and all of the others were men of experience and learning, so that that was the contest that faced the plaintiffs' counsel, and it wasn't any mean controversy.

The length of time that is taken is another element. I don't mean to say that we can estimate fees entirely upon the amount of time that the lawyer consumes in performing his services. We have to take the temperament of individuals into consideration to some extent, but not to the entire extent. Some lawyers are deliberate, and I may say slow sometimes, whereas others are more mentally alert. I don't mean to say that because they are mentally alert that they have any more ability. Many times they have a great deal less ability. It takes the man of slow processes more time to present the true situation and to meet his opponents' force than it does the man who is alert in advocacy. Of course, we have to take the question of alertness into consideration. And I suppose in this day of rapidity, of alacrity and celerity that we also have to take that into consideration. But I do not mean to say that we can evaluate professional services entirely by the amount of time that is spent. By observing it here in court during the trial, thirteen days of trial, and previously in the arguments, I [8] think that plaintiff's counsel as a whole have shown alacrity and have shown that they were not possessed of that extreme deliberative quality that wastes time in a trial.

The trial of a case is an important feature. In my judgment it is one of the most important features where a controversy is not settled by amicable adjustment, and that is where the lawyer's skill is most clearly demon-

strated. I think this type of case, especially where it is a jury case, is the type of case where the lawyer's skill should be compensated, I may say, with some liberality. There are not only the skillful attitudes that are required, but there is also the human feature. You were dealing with twelve lay persons who are all circumspect and who are all intelligent. This jury was, I think, a characteristic Federal Court jury, composed of men and women of intelligence and conscientious application to duty, and assiduity, so that you are coping with persons whose intellectual plane is superior, and it requires, especially where his opponents are of the type that Mr. Warne and his associates were, a good deal of acumen and a good deal of skill, and no little amount of tact and other qualities that require sometimes a good deal of self-restraint.

Then the final matter, of course, is the benefit to his client. Now, "benefit" is not entirely measured by pecuniary aggrandizement. Where we enter the realm of business, we [9] have the feature of good will, of credit status, and of those other elements in commercial activity which are not always estimated by money. But money is a feature in the case, and the recovery here was really \$18,500.00. I think that in estimating the fee that it is not proper to include something which the law fixes itself. The skill, of course, is there, to get the initial recovery, because unless there is some recovery there would be no trebling of the recovery, and so you can't say that the treble feature should not enter into the picture at all. It should enter in some, but it cannot enter into the picture the same as if the finding of the jury, for instance, had been, exclusive of the statutory trebling of the matter, \$55,500.00. So the recovery, I think, is a recovery of \$18,500.00.

I should say one thing more on the matter of what is called junior counsel in the petition. Where you have a firm, as the plaintiffs' counsel is in this case, there are three names in the firm and I suppose those are the three senior members of the firm. Now, of course, we have had before us here two other young lawyers who actively participated in the case. But I do not believe that we can safely estimate a fee on the number of individuals who comprise a firm. Some of these modern law firms have fifty members. If you start to estimate a fee because of the numerical classification of the firm, they may be opposed in a hotly contested, [10] involved case by one man, and I don't believe that the one man may be entitled to a greater fee for his services because he has to cope with the fifty on the other side, whereas he is alone. You cannot estimate fees for professional legal services upon any basis of that kind, and even though the profession may be getting into a business atmosphere, it is not a business. It is still a profession. It requires personality, intellectual motivation, and it requires certain standards of ethics which are not always applicable in business matters.

If we take all of these matters into consideration, gentlemen, I think that a fee of \$7,500.00 is a reasonable fee to this time and for entry into the judgment. On that basis, if we were going to segregate it, we could take forty days' time at \$100.00 a day and thirteen days' time at \$200.00 a day, which would be \$6,600.00, and then if we add to that approximately \$1,000.00 for additional services, it seems to me that in view of the finding of the jury that that would be a reasonable fee. That will be the amount, \$7,500.00, which will be included in the judgment.

You had better prepare the judgment, Mr. Christensen.

Mr. Christensen: Yes, your Honor.

Mr. Warne: And we will be served with a copy of the formal judgment?

The Court: Yes. You had better collaborate, because [11] we will want to agree on the form of the judgment for the security of all parties.

Mr. Warne: One other matter I would like to suggest to your Honor, and that is this: I request either the court's indulgence at this time or the court's suggestion at this time, or the stipulation of counsel with respect to this matter. It is our present intention to make a motion for a new trial and such other motions as in our opinion are indicated, and in support of those motions—they are not pro forma motions, and this being the first time that the whole record has been before the court, together with the finding of the jury—we desire to present to the court as fully as possible, and I may say very fully, the law which we believe to be applicable and which we believe to be determinative, and in fact, as your Honor has suggested, this case certainly is novel as to its factual aspects, in all particulars practically, and we are of the opinion that the verdict of the jury in this case or in any judgment predicated thereon will not stand.

Now, we want to fairly present that question to your Honor in the first instance. It will be the first opportunity where it can be presented in the form or in the manner which we have here.

What I am about to say is this, that we would like, in addition to the ordinary matter of time, we would like to have [12] a period of time within which to file a brief in support of the motion for new trial and such other motions as are indicated, and I would like an additional 30-day period. Now, in this instance the amount of the judgment is now fixed. Any benefits accruing to plaintiffs will accrue by way of interest on that judgment. The defendant corporation is a solvent corporation, and I submit that it would be of value to the court, and certainly of value to the defendant to have that amount of time.

The Court: What do you say, Mr. Christensen, about the request?

Mr. Christensen: I don't want to be unreasonable at all, your Honor, but it occurs to me that they have had quite a bit of time since the verdict of the jury, and that so far as the preparation of the law is concerned, I think they have done a splendid job of that up to date and it should not require that much more time. That was one of the items they complained of as to our attorneys, the time that it took.

The Court: The court has had the benefit of very voluminous and very erudite briefs from your side of the case, Mr. Warne.

Mr. Warne: May I suggest to your Honor that I believe we shall have one that is not only more erudite, but also more persuasive. But to go back a moment. If I may say this, we have attempted a different approach,

and if I may [13] be granted just a moment, I want to say this: if there is any other field of law, except the law as to unfair competition, where there are so many "trees" and so few, shall we say, standards or signposts or indications of a clear line or clear lines of law, and approaches which the courts have made to this anti-trust law, I have failed to find any other such field except, as I say, the field of unfair competition. We believe the rationale approach, as we say, will not only be more erudite, but perhaps will be a more accurate summarization and outlining and presentation of the law on this subject than has been presented to your Honor before, and I believe it would be of benefit. I mean benefit to the court. I am thinking of it solely in that regard.

The Court: When do you expect to file the motion for the new trial?

Mr. Warne: We will file the motion, your Honor, within the ten-day period. Now, as I say, I would like a period of thirty days' time.

The Court: I think that is really a little too long. I think half of that time ought to be sufficient, and the other side probably may want ten days' time in which to reply.

Mr. Christensen: Yes.

The Court: And then five days' time in which to file your final answer. If you are going to brief it in that [14] way, that would be thirty days all together, which I think ought to be sufficient.

Mr. Christensen: I think so.

Mr. Warne: Now, we would like also, in all probability, to have oral argument on it if your Honor will grant it.

The Court: If we are going to do that, I am going to cut the time on the briefs.

Mr. Warne: That is only as to items—my thought there would not be to argue the law questions which are presented in the briefs. That we would not do.

The Court: I think perhaps I had better establish the rule this way then, that at this time the court will not permit briefs and oral argument, but after the briefs are filed and after the court has had an opportunity to study the briefs, it will then indicate whether there is any point that it desires argued, and if any such appears, it will so notify counsel. Otherwise it will decide the motion on the briefs filed.

Mr. Warne: I can't ask any more than that, because what we want to do is to present the matter. Then if we excite your Honor's interest, and I believe we will, if the court then can be assisted by argument, we want to present it. We don't just want to get up here and make a speech.

The Court: Then we will leave it that way, and the court will determine whether there will be any oral argument in [15] addition to the written briefs, which will be filed within the time stated previously.

[Endored]: Filed April 5, 1946. [16]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, Friday, June 14, 1946.
10:00 A. M.

—

The Clerk: Case No. 4328-M-Civil, Larry Finley and Miriam Finley v. Music Corporation of America, a corporation, et al.

The Court: Of course, gentlemen, you are all aware of the restricted and limited scope of this hearing, and we are not going to deviate from it, as stated in the order. Proceed.

(Argument on behalf of the plaintiffs by Mr. Jaffe.)

Mr. Doherty: If the court please, Mr. Warne will lead off, and may I follow him?

The Court: Yes. Probably before counsel commences his argument the court should pose one further inquiry, without any indication or suggestion as to the ultimate decision on this one question, and I will not count this on your time, gentlemen.

Mr. Warne: Thank you.

The Court: The court has before it alternative motions: One, a motion to enter a judgment different from that which now exists, notwithstanding the verdict of the jury; and, second, a motion for a new trial.

Assuming that the power of the court is measured by the case of *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, query: Is the court in this action justified in ruling [2] upon the motion in a conditional manner, as

follows: Concluding that there is a paucity of evidence to justify or warrant, under the law, any pecuniary damage to the plaintiffs, is the court thereby precluded in this action from awarding the reasonable attorneys' fees fixed and the costs of suit?

That is the question that is posed. In considering it there are two matters that must be regarded. One is the statute itself, Section 15 of Title 15 of the United States Code, which reads as follows:

"Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

That statute must be read in connection with Rule 54 of the Rules of Civil Procedure, which, as far as is pertinent to the question posed, reads as follows:

"Rule 54. Judgments; Costs.

"(a) Definition; Form. 'Judgment' as used in these rules includes a decree and any order from which [3] an appeal lies. . . ."

There is another sentence which is immaterial.

"(b) Judgment at Various Stages. When more than one claim for relief is presented in an action the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of

the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Then subdivision (d) of Rule 54, which reads as follows:

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ."

I think that poses the question directly to counsel as to whether if, as and when the court should conclude, in addition [4] to what it has already concluded, as indicated by its partial ruling entered on June 4th, that there is a paucity or an insufficiency of evidence to justify the fixation of any definite amount, or, of any amount of damage, pecuniary damage, suffered by the plaintiffs, whether that would carry with it the provisions of the judgment which is now sought to be vacated as to the attorneys' fees and the costs.

Mr. Doherty: May I make inquiry on one point, your Honor?

The Court: Yes.

Mr. Doherty: Had your Honor in reading the rule in mind the thought that you might award a decree enjoining the defendants from future restraint as to the plaintiffs? What I had in mind is that would help me in answering the court's question as to whether or not there could be an allowance of attorneys' fees and costs.

The Court: The court's mind was not directed to any question of injunction.

Mr. Doherty: That is what I wanted to know; your Honor.

The Court: To answer that question a little more specifically, on reflection, even if the court has the power to do that which the question posed indicates, the other rules with respect to staying execution would, of course, be unaffected.

Mr. Warne: May we, in answering that question or [5] attempting to answer the question which your Honor has posed, be permitted to have some little discussion between our own counsel here in the court room so as to try to assist the court? I have a prima facie reaction, but I am not going to express it at the moment.

The Court: Yes.

(Argument on behalf of the defendants by Mr. Warne.)

(Argument on behalf of the defendants by Mr. Doherty.)

The Court: I will hear the rest this afternoon, gentlemen.

Mr. Warne: If the court please, we have the answer to your Honor's inquiry, I believe. May we present that, too, this afternoon?

The Court: Yes. We are not going to hold you to that hard and fast rule as to time.

Mr. Warne: Your Honor, is the recess until 2:00 o'clock?

The Court: 2:00 o'clock, yes.

(Whereupon, at 12:05 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [6]

Los Angeles, California, Friday, June 14, 1946.
2:00 P. M.

The Court: Now, gentlemen, we will proceed.

(Further argument by Mr. Doherty.)

(Reply argument by Mr. Jaffe.)

The Court: Gentlemen, that leaves the question which the court posed this morning, I believe.

Mr. Warne: Could we ask, your Honor, that Mr. Reich answer that question?

The Court: Yes.

Mr. Reich: I am very grateful to the court for permitting me to answer that question so as to give me an opportunity to address it.

Your Honor, this is an action at law, and it is not unlike the type of action that Mr. Doherty spoke about, an injury to property, and I hope the court will not mind my giving one example. We will suppose there is a law suit involving the ordinary collision of two automobiles, and the plaintiff goes into court and proves the negligence of the defendant, that he didn't make a signal, either didn't signal or didn't make a stop at a stop sign. He has proved negligence. Then he has got to prove damage to his automobile, and he doesn't have a receipted bill, let us say, or doesn't have an expert testify as to what the car looked like before, or whatever is necessary to prove damages. Then the court [7] throws out the case, saying, "You have proved negligence, but you haven't proved damages." The question is, how does the judgment read? It reads: Judgment for the defendant and costs to the defendant; notwithstanding that the defendant has been guilty of negligence. But damages have to be proved,

and that being a part of the case, the judgment must go for the defendant and costs go to the defendant.

Now, your Honor, I would like to point this out. There are two sections that are important. Not only Section 15 of Title 15, which is the Sherman Act, but Section 26, which is the Clayton Act. The only mention of damages or of counsel fees is on the law side on the question of damages under Section 15. On the equity side, and this case isn't on the equity side, there is no mention at all of any counsel fees.

Incidentally, with respect to Rule 54, the question of claims, if the court may hold on one and withhold on the other, this is a single action at law, and, therefore, if there are no damages on the law side, there can't be any costs and there can't be any counsel fees.

Now, my argument doesn't depend upon the statute alone. There are express cases on the point. I cite first to the court the case of *Clabaugh v. Southern Wholesale Grocers' Ass'n*, 181 Fed. Rep. 706. It is from the Circuit Court, Northern Division of Alabama, and this language which I am [8] about to quote to the court comes from page 706 of that case.

Mr. Doherty: Is that an anti-trust case?

Mr. Reich: Yes, it is under the Sherman Anti-Trust Act:

" . . . The Act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that Act by the Supreme Court in the case of *Montague & Co. v. Lowry*, 193 U. S. 38, . . . is to the effect that threefold damages are only recoverable when the plaintiff has a cause of action that would entitle the jury to award

single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages. And the same is true as to the attorney's fees. I think they are merely an incident to a judgment for the plaintiff. If no such judgment is obtained, then there can be no allowance for attorney's fees, though the settlement was made after this suit was commenced."

Now, that is an early case, and we will go to a later case. I cite to the court *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 Fed. (2d) 426, in [9] the Second Circuit, in which certiorari was denied by the United States Supreme Court. Mr. Doherty calls my attention to the fine bench that was sitting in that case, Judges Learned Hand, Swan and Augustus N. Hand. As I say, certiorari was denied in the Supreme Court. This was an equity case, and this is the language that the court uses there:

"The allowance of an attorney's fee, as authorized by Section 4"—that is Section 4 of the Sherman Act, of Section 15 of Title 15—"is incidental to the statutory right to damages, and was properly denied in the equity proceedings."

Then we will bring it up even later, your Honor, to the case of *Allen Bradley Co. v. Local Union No. 3*, in the District Court, Southern District of New York, 51 Fed. Supp. 36, dated June 10, 1943. Judge Caffey was sitting, and this case was reversed by the Circuit Court, and, in turn, reversed by the Supreme Court, but on this point of damages there was no reversal, and I read now

from Judge Caffey's decision on page 40 of the Supplement. I don't know if I gave your Honor the dicta page I was reading from.

The Court: 51 Fed. Supp. 86, you said, I believe.

Mr. Reich: It is 51 Fed. Supp. 36.

The Court: Page 36.

Mr. Reich: The language which I was going to read is on page 40. I think, though, that I did not give the court the [10] dicta page in the Decorative case. That is 23 Fed. (2d) 426, and I was reading to the court from page 428.

I am now reading from the Bradley case.

"The treble damage section of the anti-trust laws (15 United States Code Annotated, Section 15) gives to a prevailing plaintiff the right to 'a reasonable attorney's fee.' That relief, restricted to that purpose, is preemptory and is unequivocal. On the other hand, the court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws. It was so held in . . .", and then they cite the cases which I have already cited to the court, the Clabaugh case and the Decorative Stone case.

In other words, a part of the plaintiffs' case here is not only proving conspiracy, but proving certain damages, and if there are no damages, plaintiff has not maintained its case and judgment must be for the defendant, and if judgment is for the defendant, the costs must be for the defendant and, of course, no counsel fees to the plaintiff.

Now, your Honor, I wonder if I could say something further. I felt a little frustrated as I was sitting here

and listening to Mr. Jaffe, and I wonder if the Court would indulge [11] me in going beyond the inquiry which the court made of me.

The Court: I don't think I should do that. The argument has been very complete on both sides. You haven't discussed the effect of the rule which I read to you this morning.

Mr. Reich: I thought I had, your Honor.

The Court: This matter of costs under the new rules is not a peremptory matter ordinarily, and in law actions, so-called, the distinction between a law action and a suit in equity, in so far as the applicable rules of procedure in the Federal Courts are concerned, has been eliminated. Ordinarily, under the old process, in an action at law, if successful, costs would follow as a matter of course. That isn't the rule any more. Costs are in the discretion of the court in every case, a very salutary innovation in the trial of cases in the Federal Court. That is the thought the court had in mind, gentlemen, on the question.

Mr. Warne: May we inquire as to that rule number again, your Honor? Was it 54?

The Court: Rule 54, I think it is. The theory of the new rules, broadly speaking, is to afford a more adequate determination of litigation than had existed theretofore, to get away from the rigidity of procedural rules which defeated justice in many cases. So that the scheme of the new rules was to enlarge remedies and the procedural elements going to the administration of remedies. [12]

Now, if a law suit involves two parts, and I am not speaking now of actions purely in tort, such as actions for personal injuries, actions for damages for personal injuries, but I am speaking directly with respect to ac-

tions under the anti-trust laws of the United States, there are two phases to those laws, and I am referring, of course, to the private suit authorized by Section 23 of Title 15 of the Code. One is the interstate feature, coupled with the feature of commerce, the interstate commerce feature. The other is the damages that flow by reason of the injury that one suffers in his business or property because of the doing of anything forbidden in the anti-trust laws, the statute providing that such an injured person may maintain the suit.

In this case there was no certainty until the trial ensued, and until it was terminated, as to whether or not there would be any adequate evidence tending to show damage. The court appreciates what Mr. Warne very vigorously argued that from the inception of the case the position of the defendants has been that no damages could be proven. The court's rulings throughout those earlier proceedings were predicated upon the fact that that could not be ascertained until the trial took place. Under this specialized legislation concerning monopolies and conspiracies in restraint of trade, there was no way in which that question could be determined properly until the case was tried. I think that is illustrated by the decision [13] of the Supreme Court in the second *Foster & Kleistner* case, the case of *Stevens v. Foster & Kleistner*, where the Supreme Court reversed a ruling dismissing that case, and used language which was very broad, and, in my judgment, very significant and comprehensive concerning the duties of courts in these anti-trust cases. So until the case was tried and until the evidence revealed what the situation was with respect to the plaintiff's injury in his business, or injury to his property, there was no way

in which this matter of assessing in a pecuniary way that injury could be ascertained.

Now, these suits require skill in their presentation. A man can't come into the Federal Court and try an anti-trust case unless he is a lawyer. It is a highly technical and specialized field of litigation. How does he get a lawyer? I am talking now about the philosophy of this Act. I am not talking about any particular case, but I am talking about the philosophy of this law. If he is a large concern, it is an easy matter, and he can get a lawyer. But this law is designed to protect the one who is not a large concern, but one who is injured by reason of the magnitude of business, and its consolidation into enlarged activities. The only way he can get a lawyer is for him to do what is generally done. I don't know whether it was done in this case or not, and I am not speaking at this time particularly of this precise, concrete case. I am speaking as to the philosophy of this [14] law, so as to ascertain what is the correct rule to be applied in the case under the new rules of civil procedure. Before that point is reached in the trial of a case, there must be a great deal of work done in the court room, and there must be a great deal of work done out of the court room, as there was in this case. If it could be definitely known that there was no way in which a suitor who claimed to have been injured in his business or property could have that injury estimated by monetary standards, then I can see how the very purpose of the law would be defeated at the trial of the case if perchance the judgment of the court was that the proof, under the authorities, was not sufficient to permit to stand the award of damages made by the jury. I can understand in a situation of that kind where the court would send the injured

party out empty-handed and would require that party to pay the costs of the proceeding. This statute—I read it this morning, and it bears rereading on that point—states:

“Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, [15] including a reasonable attorney’s fee.”

The feature of the statute with respect to the right to recover damages has the conditional clause “by him sustained.” That isn’t at the end of the paragraph. It says he “shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”

The thought the court had in mind was that if the modern and the proper interpretation is to be given to the anti-trust laws, so as to make them effective and so as to provide the remedies which Congress had in mind when it enacted them, and which the courts have had in mind progressively since the enactment, it should frame its judgments—under the new rules of civil procedure, which permit the framing of judgments in that manner—to accomplish what the court thinks should be accomplished in the case.

The court has expressed itself repeatedly in this case, and did so by giving the case to the jury, and has found no reason to modify its judgment, as it stated in its order of June 4th,—notwithstanding the able briefs and able arguments of counsel has found no reason to modify its

judgment with respect to the interstate character of the Music Corporation of America, or as to the commercial aspect of the enterprise that it was actuating, and feeling that way, it was its duty to submit the matter to the jury for proper assessment of damages. [16]

These cases that counsel has cited here throw some light on it. I am going to read them a little more thoroughly, but unless they are clearly determinative, it is the court's view that it should frame a judgment in this case notwithstanding the verdict that will accomplish what the court thinks should be accomplished in this case.

Mr. Warne: May I make an observation in connection with your Honor's reasoning in so far as this aspect of the case goes, that is, this costs and attorney's fee aspect?

First, when your Honor reads these cases and again cogitates on the law, I think he should keep in mind that Congress enacted the statute, that it was enacted especially by lawyers, that it passed the judiciary committee, passed the Senate of the Congress, the two houses of Congress. Now, what did Congress have in mind when that statute was enacted? Did it have in mind that a judge, a trier of the facts in a law case—and this is cast in the language of law, as your Honor will note, of actions where judgments at law are rendered—did the Congress have in mind a kind of limited equity jurisdiction granted to a trial court in an instance such as this, where the plaintiff does not prevail and does not show after a lengthy trial and the utmost consideration of the case that he suffered any damages under the statute, and damages which [17] are at all recoverable? I say that your Honor cannot find and cannot hold that there is granted by the rule, by Rule 54, any right to reach into

our pockets, the pockets of a defendant for whom a judgment is rendered, and say, "You have to pay the costs of an attorney to prosecute this action against you in which he could not recover a judgment. You have to pay the costs of a plaintiff who wants to prosecute a worthless action." I say "worthless" in the sense that he might have been aggrieved, and he might have brought an action by way of an injunction in which he would not have been permitted to recover any attorney's fees.

Now, I say that your Honor cannot read into the rules, nor into the statute, any equitable right to reach into our pockets and say, "You have to pay Messrs. Dessler, Rau & Christensen." I say that is not permitted, and I say that by the express language of these rules and the statute, the anti-trust statute itself, giving rise to the cause of action, that there is no jurisdiction on the part of your Honor, and no place is there power given to the court to assess any attorney's fees.

Mr. Reich: I was going to say, your Honor, as to what Mr. Warne has said, that the case of Decorative Stone Company had before it the very arguments which he has made.

The Court: I am going to read the cases.

Mr. Reich: I would like to also point out to the court— [18]

The Court: We didn't find these cases before.

Mr. Reich: May I make just one other comment, and call attention to another important phrase in that section, and that is, "any person who shall be injured in his business." If your Honor holds that no damages have been shown in this case, then the plaintiff has not been injured in its business. It says, "any person who shall

be injured in its business," and that phrase, to my mind, is just as conclusive as the others.

The Court: Let me suggest another reason to you, gentlemen, why the argument may have some force. This may not be a strictly legal reason, but it is a very effectual one in respect to this type of law. The government should prosecute these cases. I don't think there is any doubt about that. But when we speak of the government we mean, in the prosecution of anti-trust cases, the particular administration that happens to be in power. Now, what is the intention of Congress in passing laws at this time, and what is the philosophy of those laws? That is what I am talking about. The philosophy of the law is to prevent combinations that restrain trade and that stifle competition and that destroy initiative and free enterprise. That is the basic generic foundation of these laws.

Now, suppose that the government does not want to prosecute, does not want to commence the suit. What remedy has the [19] person who is injured in his business? He hasn't any at all. He is just simply told that it is too bad—and I am not speaking now of this particular case, and, again, I am speaking of the philosophy of the law—it is all right for people to combine and to control industry for commerce in entertainment, or in any other field of human activity, if you can get enough together and have the capital to do it; that is all right. He is told the Congress didn't mean that; it only meant if the government felt like prosecuting, why, the fellow who was injured could also prosecute.

Of course, that is not what these laws mean at all, and I don't think the courts have construed them to that end.

The courts have been very liberal in these cases. They haven't reached into anybody's pocket to pay something to somebody, but they have endeavored to construe these laws so as to effectuate the purposes of the law.

Now, we know we have to look at this realistically. As Judge Cardoza said in that case which was decided in New York, a wonderfully illuminating case I think, you have to look at litigation realistically. Lawyers, like other people, are in the environment of a profit scheme. We haven't yet transformed our scheme of life into anything but a profit scheme. That is the basis of free enterprise under the Constitution. Lawyers can't work without profit. Sometimes they are able to, but it does not happen very often. They [20] have to move and have their being the same as other people do.

Now, I am going to read these cases. I didn't know that there were any cases on this point.

Mr. Warne: May I offer an observation on this last point, your Honor?

The Court: Yes.

Mr. Warne: — because you were getting away from the straight law points that have been raised before, and a part of our — I won't say "struggle," but a part of our work has been in, in effect, wrestling with an expanding concept.

Now, I want to say this with reference to this matter of the lawyer and what a man who is aggrieved has to do. I say that he has to hire a lawyer. That is the first thing to be done. Now it happens we are in the law business, and suppose it happens that we are consulted with reference to anti-trust cases, and it happens that we have one in preparation now with reference to a plaintiff's case.

We have had such matters submitted to us before, and we have rendered opinions and advice to a man that he hasn't had a cause of action for various reasons. I dare say that every one has had that experience.

Now, Congress has provided the means and the mechanics for the protection of the interests of the public, including the interests of a private man who happens to be aggrieved, [21] and he is in no different position than a man who is hurt in a traffic accident and has a cause of action and goes to a lawyer and retains him, and if he has a case upon which a recovery can be had, the lawyer takes the case on a contingent basis and either wins or loses.

I submit that your Honor must look here, shall I say, not to any expanding position of the judiciary, in so far as the rights of the court are concerned or the protection of an aggrieved party is concerned, but I say that in that instance the man must consult a lawyer and come into court and prosecute his action. I say that this rule 54 under no instance can be construed as giving to a trial court any jurisdiction beyond the plain meaning of the statute, the anti-trust law.

Now, there are instances where a prevailing party does not recover his costs, but that is an entirely different thing than saying that a party who does not prevail is entitled to recover his costs and attorney's fees, and the statute must be read in that light.

The Court: Of course, if the trial court can't do it, the upper court can't do it.

Mr. Warne: I know.

The Court: You seemed to emphasize the trial court feature.

Now, this is an answer and this will terminate it, because I am getting into advocacy instead of deciding questions, and I don't want to do that. There is a temptation to do it when we have able counsel here on both sides.

The new rules changed the entire old scheme. This business of costs following decisions is no longer the rule. Why? Because of the very factor that I am trying to emphasize, that the courts got tied up with procedural difficulties that disabled the judicial agency of the government to function in a way that would administer justice, so far as it can be administered in human forums, and thereby dissuaded people from asserting their rights because they would be mulcted in costs, and it left to the trial court, left to the trial judge, the right to say whether or not costs should be allowed in any case at all, excepting in a case where the statute said, where Congress said that costs would follow, as a matter of course, the trial court's hands were tied, but they haven't been tied here.

As I say, gentlemen, I want to read these cases, and will do so.

The motion will be submitted, gentlemen.

[Endorsed]: Filed 5, 1946. [23]

[Endorsed]: No. 11483. United States Circuit Court of Appeals for the Ninth Circuit. Larry Finley and Miriam Finley, Appellants, vs. Music Corporation of America, a corporation, H. E. Bishop and Lawrence Barnett, Appellees, and Music Corporation of America, a corporation, H. E. Bishop and Lawrence Barnett, Appellants, vs. Larry Finley and Miriam Finley, Appellees.

Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed November 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

To Paul P. O'Brien, Esq., Clerk of the Above Entitled Court:

This will advise you that the appellants, Music Corporation of America, H. E. Bishop and Lawrence Barnett, desire the record certified by you to be printed in its entirety.

Dated: November 29th, 1946.

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Said Appellants

[Endorsed]: Filed Dec. 3, 1946. Paul P. O'Brien,
Clerk.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit
No. 11,483

LARRY FINLEY and MIRIAM FINLEY,
Appellants,

vs.

MUSIC CORPORATION OF AMERICA, a Delaware
corporation, et al.,
Appellee.

STATEMENT OF POINTS AND DESIGNATION
OF RECORD

STATEMENT OF POINTS ON WHICH APPEL-
LANTS LARRY FINLEY AND MIRIAM FIN-
LEY INTEND TO RELY ON APPEAL

1. That the trial court erred in granting defendants' motion for judgment notwithstanding the verdict of the jury on the issue of monetary damages awarded to said Larry Finley and Miriam Finley, plaintiffs, by the jury in its verdict.

2. Appellants designate for printing the entire certified transcript, by stipulation of counsel.

Dated: At Los Angeles, California, this 14th day of December, 1946.

DESSER, RAU & CHRISTENSEN
By Wm. Christensen
Attorneys for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 16, 1946. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' MUSIC CORP. OF AMERICA,
ET AL., STATEMENT OF POINTS AND
DESIGNATION OF RECORD

To Paul P. O'Brien, Esq., Clerk of the Above Entitled
Court; and to Larry Finley and Miriam Finley and
to Desser, Rau & Christensen, Their Attorneys:

STATEMENT OF POINTS

The following is a statement of the points upon which
appellants intend to rely on the appeal herein:

1) The trial court erred in making its order and
judgment entered June 24, 1946, herewith appealed from,
by including therein certain language and by making its
judgment or order in the following language:

"that there is ample and substantial evidence to sup-
port and sustain the implied finding of the jury that
the defendants have conspired to restrain interstate
commerce and to monopolize interstate commerce in
that portion of the business of musical entertainment
involving bands, orchestras, and attractions furnish-
ing dance music at places of public entertainment,"

and together with the following part of said order and
judgment, to wit:

"And, Accordingly, judgment is ordered for the
plaintiffs, Larry Finley and Miriam Finley, upon all
the issues herein, except damages per se, and also
for their costs in the sum of \$1592.85, and the fur-
ther sum of \$7500.00 reasonable attorneys' fees, also
as part of their costs herein, making in all the sum
of \$9092.85 as their total costs of suits."

2) The trial court erred in making its order and judgment of June 24, 1946, whereby it granted defendants' motions for judgment notwithstanding the verdict of the jury.

3) The trial court erred in making its order and judgment of June 24, 1946, and in ruling on defendants' motion notwithstanding the verdict and for a new trial by denying said defendants' motion for a new trial.

4) The trial court erred by making its order appealed from, dated and filed August 8, 1946, which denied and refused said defendants' motion to re-assess and re-tax costs and said defendants' motion to reform and modify the court's order and judgment of June 24, 1946, and to grant judgment for the defendants.

DESIGNATION OF RECORD

Appellants designate for printing in the record on the appeal the complete record and exhibits in the action.

Dated: December 17th, 1946.

PACHT, PELTON, WARNE, ROSS
& BERNHARD

By Clore Warne

Attorneys for Appellants

[Endorsed]: Filed Dec. 20, 1946. Paul P. O'Brien,
Clerk.

Nos. 11485-11486

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11485

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Asso-
ciation,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the
Estate of HERBERT G. RELL, Bankrupt,

Appellee.

and

No. 11486

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Asso-
ciation,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the
Estate of LOVINA RELL, Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division.



Nos. 11485-11486

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11485

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the
Estate of HERBERT G. RELL, Bankrupt,

Appellee.

and

No. 11486

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the
Estate of LOVINA RELL, Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division.

INDEX TO DISTRICT COURT CASE NO. 44287-WM
(Circuit Court No. 11485)

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

HENRY MERTON

1204 Loew's State Building

Los Angeles 14, Calif.

For Appellee:

FRANK M. CHICHESTER

617 South Olive Street

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California
Central Division

In Bankruptcy No. 44287-WM

In the Matter of

HERBERT G. RELL,

Bankrupt

To the Honorable Judge of
the District Court of the United States for the
Southern District of California:

The Petition of Herbert G. Rell, residing at No. 5280
West Adams Blvd., in the City of Los Angeles, County
of Los Angeles, State of California, by occupation a
garage owner, and employed by.....
(or engaged in the business of.....),
respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible

to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

HERBERT G. RELL

Petitioner

EARL A. EVERETT

Attorney for Petitioner

State of California

County of Los Angeles—ss.

I, Herbert G. Rell, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

HERBERT G. RELL

Petitioner

Subscribed and sworn to before me this 28th day of February, 1946.

EARL A. EVERETT

Notary Public in and for Los Angeles County,
California.

(Official character.)

[Endorsed]: Filed Mar. 6, 1946. [2]

United States District Court
Southern District of California

No. 44,287-WM

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on March 6, 1946.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44,287-WM Title of Proceedings Herbert G. Rell. Filed 3-6-46 Referee Hugh L. Dickson, Esq., Los Angeles, Calif.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Mar. 6, 1946. [3]

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California
Central Division

In Bankruptcy No. 44288-WM

In the Matter of

LOVINA RELL,

Bankrupt

To the HonorableJudge of
the District Court of the United States for the
Southern District of California:

The Petition of Lovina Rell, residing at No. 5280 West Adams Blvd., in the City of Los Angeles, County of Los Angeles, State of California, by occupation a cosmetologist, and employed by Dolly's Beauty Salon, Mansfield and Wilshire Blvd., Los Angeles (or engaged in the business of), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his

creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

LOVINA RELL
Petitioner

EARL A. EVERETT
Attorney for Petitioner

State of California
County of Los Angeles—ss.

I, Lovina Rell, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

LOVINA RELL
Petitioner

Subscribed and sworn to before me this 28th day of February, 1946.

EARL A. EVERETT
Notary Public in and for Los Angeles County,
California.

(Official character.)

[Endorsed]: Filed Mar. 6, 1946. [2]

United States District Court
Southern District of California

No. 44,288-WM

ORDERS OF ADJUDICATION AND OF
GENERAL REFERENCE

At Los Angeles, in said District, on March 6, 1946.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44,288-WM Title of Proceedings Lovina
Rell Filed 3-6-46 Referee Hugh L. Dickson, Esq.,
Los Angeles, Calif.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Mar. 6, 1946. [3]

In the District Court of the United States for the
Southern District of California
Central Division

No. 44287-WM No. 44288-WM

In the Matter of

HERBERT G. RELL,

Bankrupt.

In the Matter of

LOVINA RELL,

Bankrupt.

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William C. Mathes, Judge of the District Court of the United States.

I, Hugh L. Dickson, one of the Referees of the above Court do hereby certify that in the course of the proceedings in the above entitled matters, before me, upon hearing of the Trustee's Petition to set aside and declare void a certain Chattel Mortgage in which the Citizens National Trust and Savings Bank of Los Angeles was the Chattel Mortgagee, the following questions were presented:

- (a) Did the failure on the part of the Mortgagor or the Mortgagee named in said Chattel Mortgage, to publish a Notice of Intention to Chattel Mortgage the fixtures and equipment of a garage owner before the consummation of such mortgage, as required by Section [4] 3440 of the Civil Code of the State of California, render the said Chattel Mortgage void as against the Trustee in Bankruptcy?

- (b) Did the failure to record the said Chattel Mortgage in the Office of the County Recorder of Los Angeles County, State of California for a period of twenty (20) days following its execution by the parties thereto render the said Chattel Mortgage void as against the Trustee in Bankruptcy?
- (c) Was the failure to cause the Mortgagee named in the said Chattel Mortgage to be registered as the legal owner of the motor vehicles described therein for a period of two months (2) and sixteen days (16), following the execution of the said Chattel Mortgage, such a delay in registration as to render the said Chattel Mortgage void as against the Trustee in Bankruptcy?

A stipulation of facts setting forth the details of the execution and the recording of the Chattel Mortgage was filed on April 30, 1946 and a Modification to the Stipulation of Facts was filed on May 7, 1946. Thereafter memoranda of Points and Authorities were presented and on May 14, 1946, I made and filed written Findings of Fact and Conclusions of Law, hereunto annexed and on May 14, 1946, I made and entered, pursuant thereto, the following Order: (Omitting caption and preamble),

“It Is Hereby Ordered, Adjudged and Decreed:

I.

That the Chattel Mortgage covering the following described personal property executed by the above named Bankrupts in favor of the Citizens National Trust and Savings Bank of Los Angeles, is void as against George Gardner, Trustee in Bankruptcy, to-wit: (Describing all

of the personal property set forth in the Chattel Mortgage) [5]

II.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, is the owner of, and entitled to the possession of all those items of personal property more particularly described in the foregoing paragraph I, free and clear of any right, title, interest, estate, claim or lien on the part of the Citizens National Trust and Savings Bank of Los Angeles.

III.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, has a right to have and apply the value of the said personal property free and clear of the purported lien of said chattel mortgage to the payment of the obligation of the bankrupt estates and for and on behalf of all the creditors of said bankrupt estates.

Done in Open Court This 14 Day of May, 1946.

HUGH L. DICKSON

Referee in Bankruptcy."

And that thereafter and on May 20, 1946 and within the time provided by law, the creditors, Citizens National Trust and Savings Bank, a National Banking Association, served and filed its Petition for a Review of said Order by the Judge.

Attached to this certificate are the following documents:

- (a) Trustee's Petition for Order to Show Cause Re Chattel Mortgage of Citizens National Trust and *Saving* Bank of Los Angeles.
- (b) Stipulation of Facts in Re Order to Show Cause.

- (c) Modification to Stipulation of Facts in Re Order to Show Cause.
- (d) Findings of Fact and Conclusions of Law.
- (e) Respondent's Proposed Amendments to Findings of Fact and Conclusions of Law. (Allowed on May 14, 1946.)
- (f) Order (Pursuant to Findings of Fact and Conclusions [6] of Law).
- (g) Petition for Review.

Dated: June 25, 1946.

HUGH L. DICKSON

Referee in Bankruptcy. [7]

DOCUMENT NO. 1

PETITION FOR ORDER TO SHOW CAUSE RE
CHATTEL MORTGAGE OF CITIZENS NA-
TIONAL TRUST AND SAVINGS BANK OF
LOS ANGELES

Your Petitioner, George Gardner, respectfully represents that he is the duly appointed, qualified and acting Trustee in Bankruptcy in the above entitled matters.

I.

That heretofore, and on or about April 2, 1946, *be* conducted an oral examination of the above named Bankrupts and examined their schedules of assets and liabilities upon file herein.

II.

That among the creditors holding securities as set forth in the said schedules is the respondent, the Citizens Na-

tional Trust and Savings Bank of Los Angeles; that the security held by the said creditor appears to be a Chattel Mortgage on all of the equipment of the Bankrupts located at 5278 West Adams Boulevard, Los Angeles, California, consisting of one 1936 Plymouth Sedan, one 1935 Ford Pickup Truck, one 1936 Willys Pickup Truck, one air compressor tank and miscellaneous tools and equipment ordinarily used by a garage owner or machinist; that the alleged value of the securities covered by the Chattel Mortgage is the sum of \$5000.00 and the alleged amount due or claimed by the said creditor is the sum of \$2810.00.

III.

That your Petitioner is informed and believes and therefore alleges that the said Chattel Mortgage referred to herein was executed by the Bankrupts on May 4, 1945; that thereafter and on May 5, 1945 the respondent filed for record in the Office of the County Recorder of Los Angeles County, State of California a Notice of Intention to Chattel Mortgage. [8]

IV.

The said respondent stated therein that notice is given, pursuant to Section 3440 of the Civil Code of the State of California that on May 4, 1945 the above named Bankrupts, the owners of certain personal property described as fixtures of a garage located at 5278 West Adams Boulevard, Los Angeles, California intend to place a Chattel Mortgage upon said fixtures and that said Chattel Mortgage is to be executed and the consideration therefor will be paid on or about May 11th, 1945 at 740 South Hill Street, Los Angeles, California.

V.

That thereafter and on or about May 24, 1945 the said Chattel Mortgage was filed for record in the Office of the County Recorder of Los Angeles County State of California.

VI.

That Your Petitioner is informed and believes and therefore alleges that no copy of any notice of intention to Chattel Mortgage the personal property referred to herein was ever published in a newspaper of general circulation within the township in which the said Chattel Mortgage was made.

VII.

That your Petitioner is informed and believes and therefore alleges that prior to the execution of the said Chattel Mortgage the above named Bankrupts were indebted to various unsecured creditors as more particularly appears from Schedule A-3 of the Bankrupts on file herein.

VIII.

That by virtue of the failure on the part of the respondent, the Citizens National Trust and Savings Bank of Los Angeles, to comply with the provisions of Section 3440 of the Civil Code of the State of California and by virtue of the failure of the said respondent to file for record a copy of said [9] Chattel Mortgage within a reasonable time following its execution, the said Chattel Mortgage is void and of no effect as against your Petitioner.

Wherefore, Your Petitioner prays for the issuance of an Order requiring the respondent, the Citizens National Trust and Savings Bank of Los Angeles, to show cause,

if any it has, why an Order should not be made herein declaring the said Chattel Mortgage referred to above to be void and of no effect as against your Petitioner, the Trustee in Bankruptcy herein, and for such other relief as to the Court may seem just.

GEORGE GARDNER

Trustee.

FRANK M. CHICHESTER

Attorney for Trustee.

[Verified.] [10]

DOCUMENT NO. 2

STIPULATION OF FACTS IN RE ORDER TO SHOW CAUSE

In connection with the Order to Show Cause issued in these proceedings April 15, 1946 directed to Citizens National Trust & Savings Bank of Los Angeles, Trustee George Gardner and Respondent Citizens National Trust & Savings Bank of Los Angeles, through their respective counsel, stipulate to the following facts:

1. That Respondent Bank holds a chattel mortgage on the property and equipment of the bankrupt located at 5278-80 West Adams Boulevard, Los Angeles, California, consisting of one 1936 Plymouth Sedan, one 1935 Ford pick-up truck, one 1936 Willys pick-up truck, one air compressor tank, and miscellaneous tools and equipment ordinarily used by a garage owner or machinists, more particularly described in said chattel mortgage. That the approximate value of the property so covered by said chattel mortgage is the sum of \$5,000.00, and the amount

due and unpaid on said chattel mortgage is the sum of \$2,812.15.

2. That said chattel mortgage was executed May 4, 1945, by the bankrupts, Herbert G. Rell and Lovina Rell, and deposited in an escrow at Citizens National Trust & Savings Bank at its office at 740 South Hill Street, Los Angeles, California, on said date, said escrow being identified as Escrow No. 2-26235. That said chattel mortgage was so deposited in said escrow pursuant to written escrow instructions made on and under date of May 4, 1945, by and between said bankrupts, Herbert G. Rell and Lovina Rell, one Andrew H. Wilson, and respondent Citizens National Trust & Savings Bank of Los Angeles.

3. The transaction involved in the said escrow and as evidenced by instructions of the parties thereto consisted as [11] follows: A sale by Andrew H. Wilson of a garage business located at 5278-80 West Adams Boulevard, Los Angeles, California, together with the automobiles and equipment incorporated and described in respondent bank's chattel mortgage.

That as part of said transaction and as so evidenced by the joint escrow instructions of the parties, Respondent Bank was to and did advance to said bankrupts, Herbert G. Rell and Lovina Rell, in said escrow the sum of \$3,150.00 to enable them to pay to the said Andrew H. Wilson, the vendor of said business, his full purchase price called for by said vendor in said escrow for the sale of said business, automobiles and equipment.

That there was deposited in said escrow a Bill of Sale by the vendor, Andrew H. Wilson, covering said property, equipment and automobiles. That the usual notice of intended sale by the vendor, Andrew H. Wilson, was

recorded and published. That the instructions of the parties directed, at the close of the escrow, the delivery of a Bill of Sale to the vendees, Herbert G. Rell and Lovina Rell, bankrupts herein, the delivery to Respondent Bank of the aforesaid chattel mortgage, and the payment from the funds deposited in said escrow of certain bills against the business incurred by the vendor, Andrew H. Wilson, and the balance thereof to said Wilson on account of his purchase price.

4. That said escrow was, in fact, closed May 19, 1945 and on said day the escrow depository disbursed the funds on deposit in said escrow according to the instructions of the parties, and concurrently delivered the Bill of Sale covering the said automobiles and equipment to the purchasers, the said bankrupts, Herbert G. Rell and Lovina Rell, and delivered the aforementioned chattel mortgage to respondent bank.

5. Payment of the consideration to the vendor and delivery of the Bill of Sale to the vendee and the chattel mortgage to respondent bank were not to be made until all of [12] the terms and conditions of the escrow had been complied with. On May 19, 1945, the terms and conditions of said escrow had been complied with and delivery of the funds and instruments were accordingly made on that date.

6. That in addition to the funds paid through the escrow referred to above, the said bankrupts, paid outside of the escrow to Andrew H. Wilson the sum of \$1,000.00 and executed and delivered to the said Wilson a promissory note for \$1,000.00 secured by a chattel mortgage junior to the chattle mortgage of the respondent herein.

7. That a notice of intention to chattel mortgage the equipment hereinbefore referred to was recorded on May 5, 1945, by respondent bank, reciting that the consideration therefor would be paid on or about the 11th day of of May, 1945, at 740 South Hill Street, Los Angeles, California.

No notice of intention to chattel mortgage said property was published in a newspaper of general circulation within the township in which said chattel mortgage was made.

That the escrow instructions executed May 4, 1945, provided that the respondent bank would publish a notice of intention to mortgage. That on May 17, 1945, an approval as to form of the instruments filed in said escrow was executed by the respondent bank, the bankrupts, Herbert G. Rell and Lovina Rell, and Andrew H. Wilson, which included among other things "We are satisfied with the publication of intent to mortgage made in connection with this transaction by said Citizens National Trust & Savings Bank of Los Angeles."

It Is Further Stipulated By and Between Said Parties as Follows:

A. That the petition for the aforementioned Order to Show Cause made by said trustee and filed on April 15, 1946, be deemed to be amended to include an allegation to the effect that [13] no certified copy of the chattel mortgage was promptly deposited with the Department of Motor Vehicles of the State of California at Sacramento, California, following its execution.

B. That in this connection and as an answer thereto by said respondent, it is stipulated that G. E. Weber, if

appearing as a witness for and on behalf of respondent, would testify under oath substantially to the following:

That he is the assistant manager of the Instalment Loan Department of respondent bank; that he had direct supervision of the loan secured by the chattel mortgage here in question for and on behalf of respondent bank.

That the chattel mortgage was executed and deposited in the escrow hereinabove referred to on May 4, 1945. That said chattel mortgage was not released from said escrow and delivered to respondent bank, in its capacity as the mortgagee, until the close of said escrow, to wit, on May 19, 1945.

That Andrew H. Wilson did not deliver the ownership certificates to the respondent bank, stating to Mr. G. E. Weber that they were at that time located at the Department of Motor Vehicles in Sacramento, California, in the process of being transferred to the said Wilson. That on May 4, 1945, Mr. Herbert G. Rell also stated to said G. E. Weber that they were in the Department of Motor Vehicles in Sacramento, and that as soon as they were returned to Wilson, Rell would assume the responsibility of seeing that they were delivered to the said G. E. Weber or the respondent bank, whereupon the said Weber requested Herbert G. Rell and Lovina Rell to sign and they did so sign a form of trust receipt setting forth in effect that they acknowledged holding in trust for the said bank, as a trustor, documents or instruments [14] covering the aforementioned automobiles and undertook in said written trust receipt that upon receipt of the ownership certificates on said automobiles

from the Department of Motor Vehicles, they would deliver them in the proper form to the respondent bank. That said Weber, if appearing as a witness and testifying to the foregoing, would then produce to the Court the original written instrument, entitled Trust Receipt, to which he referred, and the same would be found to be in substance and in effect as to its contents as he would have so testified.

That on or about the 3rd or 4th of June, 1945, the ownership certificates and registration cards on said automobiles were delivered to respondent bank showing the ownership of said automobiles in the said Andrew H. Wilson, and on June 8, 1945, respondent bank sent a certified copy of said chattel mortgage, with the ownership certificates, endorsed, by said Wilson, Rell and the Bank, and registration cards and fee to the Department of Motor Vehicles in Sacramento for recordation. Thereafter, on June 29, 1945, respondent received a letter from the Department of Motor Vehicles, stating in effect that there was a technical defect, the exact nature of which the said witness could not remember, but it was either insufficient fee transmitted with said documents or incorrect endorsement of a name.

That the said witness, if asked the question if the chattel mortgage and ownership certificates were returned with the letter referred to, his answer would be that he does not remember; that his department at that time was handling hundres of automobile loans secured by chattel mortgages, it being a central office for that [15] kind of loan for some thirty-four branches of Respondent Bank. That there does

not appear in his records anything to disclose one way or the other if the mortgage and/or ownership certificates were returned with the aforementioned letter from the Department of Motor Vehicles. Whatever the defect was, respondent bank corrected it and returned the forwarding letter with appropriate notations on the reverse side to the Department of Motor Vehicles. That the ownership certificates were later returned to respondent bank bearing issuance date of July 20, 1945.

It Is Further Stipulated by and between the parties, through their respective counsel, that there is on file in these proceedings schedules of the trustee listing claims of certain creditors which purport to have existed prior to the giving of the chattle mortgage herein.

Dated: April 30, 1946.

FRANK M. CHICHESTER

Attorney for George Gardner, Trustee

HENRY MERTON

Attorney for Citizens National Trust &
Savings Bank of Los Angeles [16]

DOCUMENT NO. 3

MODIFICATION TO STIPULATION OF FACTS IN RE ORDER TO SHOW CAUSE

The Trustee and Respondent Citizens National Trust & Savings Bank of Los Angeles, having discovered since the making and filing of their written Stipulation of Facts dated April 30, 1946, that the same is in error in certain particulars, hereby stipulate, through their respective coun-

sel, that said written Stipulation of Facts be modified in order to cure said error as follows:

A. That the automobile described as one Ford Pick-Up Truck, 1935 model, was the only automobile sold to the bankrupts by the said Andrew H. Wilson and was so sold to the bankrupts through the escrow, together with the equipment of the garage business referred to.

B. That it is true that all three ownership certificates covering the three automobiles, respectively, were, prior to delivery thereof to the Respondent Bank, at the Department of Motor Vehicles at Sacramento, in the process of transfer of ownership to said bankrupts at the times stated in the said stipulation of facts, but that legal and registered ownership of the automobile described as one Willys pick-up truck, 1936 model was being transferred to the bankrupts from a vendor other than said Andrew H. Wilson, the name of whom the bankrupts cannot remember, and the legal ownership of the automobile described as one 1936 Plymouth Sedan was being transferred by the Bank of America to said bankrupts pursuant to the discharge of a chattel mortgage on said automobile previously held by said Bank of America. The registration of said automobile last mentioned was at all times herein involved in the name of said bankrupts. Possession of [17] said automobile and the Willys pick-up truck was in said bankrupts prior to and subsequent to the closing of the escrow between Wilson, respondent, and the bankrupts. The automobile purchased by the bankrupts from Wilson; namely, the Ford pick-up truck, 1935 model, was not in the possession of said bankrupts until after the close of the escrow referred to.

It Is Further Stipulated that except as modified above, the said written Stipulation of Facts dated April 30, 1946, remains as is.

Dated: May 7, 1946.

FRANK M. CHICHESTER

Attorney for George Gardner, Trustee

HENRY MERTON

Attorney for Citizens National Trust &
Savings Bank of Los Angeles, Re-
spondent [18]

DOCUMENT NO. 4

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The "Petition for Order to Show Cause Re Chattel Mortgage of Citizens National Trust and Savings Bank of Los Angeles" of George Gardner, as Trustee in Bankruptcy of the above named bankrupt estates, together with the "Order to Show Cause" issued thereon dated April 15, 1946, came on regularly to be heard on April 23, 1946 before the Honorable Hugh L. Dickson, Referee in Bankruptcy, presiding in the above entitled matters;

George Gardner, as Trustee, appeared in person and by his counsel, Frank M. Chichester; the respondent, Citizens National Trust and Savings Bank of Los Angeles, appeared by its counsel, Henry Merton.

Pursuant to the oral agreement of counsel, the petition of the Trustee was taken under submission pending the filing herein of a "Stipulation of Facts." Said "Stipulation of Facts" was duly filed on April 30, 1946 and a

"Modification to Stipulation of Facts in re Order to Show Cause" was filed on May 7, 1946.

Thereafter counsel duly served and filed their "Points and Authorities" relative to the issues presented, and the Court being advised in the premises, the Court now makes and files this, its Findings of Fact and Conclusions of Law constituting the decision of this Court:

FINDINGS OF FACT:

I.

That it is true that at all times herein George Gardner was and now is the duly qualified and acting Trustee for the above entitled bankrupt estates. [19]

That it is true that among the assets of the above entitled estates, there came into possession of the Trustee, George Gardner, those certain items of personal property, described in Exhibit "A" attached hereto and by reference made a part hereof, ordinarily used by a garage owner or machinist, together with three motor vehicles described as one 1936 Plymouth Sedan, Motor No. P2-370259, Serial No. 1161805, one 1935 Ford Pickup Truck, Motor No. DR89610, Serial No. 18-2159920, and one 1936 Willys Pickup Truck, Motor No. 77-45263, Serial No. 77-46946, all situated at 5278 West Adams Boulevard, Los Angeles, California.

III.

That it is true that on or about May 4, 1945 the above named bankrupts executed their promissory note and chattel mortgage in favor of the respondent, Citizens National Trust and Savings Bank of Los Angeles, as security for their indebtedness to said bank in the sum of

It Is Further Stipulated that except as modified above, the said written Stipulation of Facts dated April 30, 1946, remains as is.

Dated: May 7, 1946.

FRANK M. CHICHESTER

Attorney for George Gardner, Trustee

HENRY MERTON

Attorney for Citizens National Trust &
Savings Bank of Los Angeles, Re-
spondent [18]

DOCUMENT NO. 4

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The "Petition for Order to Show Cause Re Chattel Mortgage of Citizens National Trust and Savings Bank of Los Angeles" of George Gardner, as Trustee in Bankruptcy of the above named bankrupt estates, together with the "Order to Show Cause" issued thereon dated April 15, 1946, came on regularly to be heard on April 23, 1946 before the Honorable Hugh L. Dickson, Referee in Bankruptcy, presiding in the above entitled matters;

George Gardner, as Trustee, appeared in person and by his counsel, Frank M. Chichester; the respondent, Citizens National Trust and Savings Bank of Los Angeles, appeared by its counsel, Henry Merton.

Pursuant to the oral agreement of counsel, the petition of the Trustee was taken under submission pending the filing herein of a "Stipulation of Facts." Said "Stipulation of Facts" was duly filed on April 30, 1946 and a

"Modification to Stipulation of Facts in re Order to Show Cause" was filed on May 7, 1946.

Thereafter counsel duly served and filed their "Points and Authorities" relative to the issues presented, and the Court being advised in the premises, the Court now makes and files this, its Findings of Fact and Conclusions of Law constituting the decision of this Court:

FINDINGS OF FACT:

I.

That it is true that at all times herein George Gardner was and now is the duly qualified and acting Trustee for the above entitled bankrupt estates. [19]

That it is true that among the assets of the above entitled estates, there came into possession of the Trustee, George Gardner, those certain items of personal property, described in Exhibit "A" attached hereto and by reference made a part hereof, ordinarily used by a garage owner or machinist, together with three motor vehicles described as one 1936 Plymouth Sedan, Motor No. P2-370259, Serial No. 1161805, one 1935 Ford Pickup Truck, Motor No. DR89610, Serial No. 18-2159920, and one 1936 Willys Pickup Truck, Motor No. 77-45263, Serial No. 77-46946, all situated at 5278 West Adams Boulevard, Los Angeles, California.

III.

That it is true that on or about May 4, 1945 the above named bankrupts executed their promissory note and chattel mortgage in favor of the respondent, Citizens National Trust and Savings Bank of Los Angeles, as security for their indebtedness to said bank in the sum of

Three Thousand One Hundred Fifty Dollars, (\$3150.00); that it is true that the property described in said chattel mortgage, as more particularly set forth in Exhibit "A" is the property that came into the possession of the Trustee, George Gardner, upon the filing of the petitions in bankruptcy herein as set forth in paragraph II above.

IV.

That it is true that said chattel mortgage was not filed for record in the office of the County Recorder of Los Angeles County until May 24, 1945.

V.

That it is true that no "Notice of Intention to Chattel Mortgage" was ever published in a newspaper of general circulation within the Township in which the said chattel mortgage was made.

VI.

That it is true that said chattel mortgage was given as [20] partial payment only for the property described therein, excluding therefrom the 1936 Plymouth Sedan and the 1936 Willys Pickup Truck; that it is true that said bankrupts paid the sum of Five Thousand Dollars (\$5000.00) to the seller of said property; that it is not true that said chattel mortgage was a purchase-money mortgage.

VII.

That it is true that on May 4, 1945 the bankrupts were indebted to various creditors other than the respondent, Citizens National Trust and Savings Bank of Los Angeles.

VIII.

That it is true that on or about June 8, 1945 the respondent placed a certified copy of the said chattel mortgage together with the certificates of ownership for the said motor vehicles together with certain fees in the United States mail addressed to the Motor Vehicle Department, Sacramento, California; that on or about June 29, 1945 the respondent was notified that either insufficient fees had been deposited with the Motor Vehicle Department or that the said certificates of ownership were not properly endorsed all as provided by the Vehicle Code of the State of California.

IX.

That it is true that on July 20, 1945 the respondent, Citizens National Trust and Savings Bank of Los Angeles was registered as the legal mortgagee of the said motor vehicles in the Motor Vehicle Department, Sacramento, California.

X.

That it is true that the respondent, Citizens National Trust and Savings Bank, failed to act promptly or diligently in causing the said chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County or in depositing a certified copy of said chattel mortgage with the Motor Vehicle [21] Department, Sacramento, California.

AS CONCLUSIONS OF LAW FROM THE
FOREGOING FINDINGS OF FACT:

I.

That the hypothecation of the personal property referred to in the foregoing Findings of Fact from the bankrupts to the Citizens National Trust and Savings Bank of Los Angeles is void as against George Gardner, Trustee in Bankruptcy.

II.

That the respondent, the Citizens National Trust and Savings Bank of Los Angeles, failed to comply with the provisions of Section 3440 of the Civil Code of the State of California.

III.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, is the owner of, and entitled to the possession of all those items of personal property more particularly described in the said chattel mortgage, a copy of which is on file herein, free and clear of any right, title, interest, estate, claim or lien on the part of the Citizens National Trust and Savings Bank of Los Angeles.

IV.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, has the exclusive right to have and apply the value of all of the said personal property free and clear of the lien of said chattel mortgage to the payment of the obligations of the bankrupt estates and for and on behalf of all the creditors of said bankrupt estates.

Let Judgment Be Entered Accordingly.

HUGH L. DICKSON

Referee in Bankruptcy. [22]

EXHIBIT "A"

- 1 – Air Compressor-Tank #5847, Motor #G.E. KP7056
With Kelley Compressor #95324
- 1 – Lincoln Water Pump grease gun Model 155
- 1 – Lincoln Universal grease gun Model 158
- 1 – Wall type spark plug cleaner
- 20 – Expansion Reamers
 - 1 – Engine Analyzer
 - 1 – Paint Machine and Mixer
Tow Chaines
 - 1 – Tubula Flaring Machine, with Ridge Reamer and
Ford Valve lifter (Bar Type)
Air Hoses and Attachments
Water Hoses and Attachments
 - 1 – Wheel Puller and pinon puller
 - 1 – Tire Tube Piston Tank
 - 1 – Auto Parts Boiling on rollers
 - 1 – Auto Parts Cleaning Tank
 - 1 – Black & Decker Super Service Valve Shop Type K.W.
#336210, with Vibro Centric Valve Seat Grinder
Type B #A355607 and Stone Pressing Stand Type
A #368482
 - 1 – Manely Auto Tow Crane and Spout Lite #150-55578
 - 1 – Westinghouse Battery Charger #954966B
 - 1 – Booster Battery
 - 1 – Manely Front End Machine and Attachments
 - 1 – Grinder-Baldor Electric Buffer and Grinder, Type
X20, #021111
 - 1 – Large metal bench.
 - 1 – Small “ “
 - 1 – Metal Cabinet Type Bench

- 1 – Chiskolm Moore Chain Hoist 1 ton
 High Boys (oil)
 Oil Can Drums
- 1 – Complete Welding Outfit
- 1 – Pair Goggles
- 1 – Walker Floor Hdy Jack
 Paint Spray Guns #6 Serial, #0681 Devilbliss –
 Shelbord and Attachments, Hose, Air Regulations
 cup
- 30 – Brake Reliner Wyman Marathon Electric Motor
 #023828
- 1 – Desk
- 1 – File Cabinets
- 1 – Chair
- 1 – Bench Type Vise
 Billing Machines and Forms
- 3 – Sets Automobile Stands
- 1 – Brake Fluid Machine
- 1 – Battery Box and Filler
- 1 – Automobile tow dolly [23]

DOCUMENT NO. 5

RESPONDENT'S PROPOSED AMENDMENTS TO
FINDINGS OF FACT AND CONCLUSIONS OF
LAW

Respondent, Citizens National Trust & Savings Bank of Los Angeles, respectfully requests that the proposed findings of fact submitted to the Honorable Hugh L. Dickson, Referee, be amended in the following particulars:

Paragraphs III and IV thereof as follows:

That it is true that on or about May 4, 1945, the above named bankrupts executed a chattel mortgage in favor of the respondent, Citizens National Trust & Savings Bank of Los Angeles, as security for a note bearing said date in the sum of Thirty-One Hundred Fifty (\$3150.00) Dollars, and that it is true that the property described in said chattel mortgage, more particularly described in Exhibit "A". is the property that came into the possession of the Trustee, George Gardner, upon the filing of the petitions of bankruptcy herein, as set forth in Paragraph II above. That it is true that said chattel mortgage was deposited in an escrow on said May 4, 1945, pursuant to written escrow instructions made under said date by and between said bankrupts, Andrew H. Wilson, and respondent bank. That it is true that the transaction involved in said escrow and as evidenced by the instructions of the parties was one wherein Andrew H. Wilson was selling a garage business located at 5278-80 West Adams Boulevard *Boulevard*, Los Angeles, California, together with one of the automobiles heretofore referred to; namely, one Ford Pick-Up Truck, 1935 model, and equipment incorporated and described in said respondent bank's chattel mortgage; that it is true that respondent bank deposited in said escrow the sum of \$3150.00 to enable the bankrupt to pay the vendor Andrew H. Wilson part of his full purchase price called for by him in said escrow for the sale of [24] said business, automobile and equipment. That it is true that said chattel mortgage was delivered to respondent bank at close of escrow, to wit, on May 19, 1945. That it is true that after the receipt of said chattel mortgage by respondent bank from

the escrow, after the close thereof, as aforesaid, it filed said chattel mortgage for record in the Office of the County Recorder of Los Angeles County on May 24, 1945.

That it is true that all three ownership certificates covering all three automobiles, respectively, were at the time of the closing of said escrow on May 19, 1945, not available for delivery to respondent bank, in that said ownership certificates were in the Division of Motor Vehicles in Sacramento in the process of transfer of ownership in the following particulars: The ownership of the 1935 Ford Pick-Up Truck sold by Andrew H. Wilson to said bankrupts was being transferred from another party to said vendor Andrew H. Wilson. The ownership of the Willys Pic-Up Truck, 1936 model, was being transferred to the bankrupts from a vendor other than the aforesaid Andrew H. Wilson. The ownership of the 1936 Plymouth Sedan was being transferred to the bankrupts by the Bank of America pursuant to discharge of a chattel mortgage on said automobile previously held by said Bank of America. That said ownership certificates and registration cards on said automobiles were later delivered to respondent bank on or about the 3rd or 4th day of June, 1945.

That it is true that the automobile purchased by the bankrupts from said Wilson; namely, the 1935 Ford Pick-Up Truck, was not in the possession of said bankrupts until after the close of the escrow referred to. That it is true that the automobiles described as 1936 Plymouth Sedan and the 1936 Willys Pick-Up Truck were not involved in the sale of the business and equipment by Andrew H. Wilson to the bankrupts, handled through

escrow, as aforesaid, but had been independently acquired by said bankrupts. [25]

That Paragraph 6 of the Trustee's Proposed Findings of Fact be modified to the extent that there be eliminated therefrom the following "That it is not true that said chattel mortgage was a purchase money mortgage" as it is submitted that this is a Conclusion of Law rather than a Finding of Fact.

That Paragraph 10 of the Trustee's Proposed Findings of *Fac* be eliminated, as it is submitted that this is a Conclusion of Law, rather than a Finding of Fact.

Dated: May 13, 1946.

Respectfully submitted,

HENRY MERTON

Attorney for Respondent Citizens National Trust &
Savings Bank of Los Angeles [26]

DOCUMENT NO. 6

ORDER (PURSUANT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW)

The Petition for Order to Show Cause quieting title in the Trustee of George Gardner, as Trustee in Bankruptcy of the above named Bankrupt estates, together with the Order to Show Cause issued thereon, dated April 15, 1946, came on regularly to be heard on April 23, 1946 before the Honorable Hugh L. Dickson, Referee in Bankruptcy, presiding in the above entitled matters;

George Gardner, as Trustee, appearing in person and by his counsel, Frank M. Chichester; the respondent, Citizens National Trust and Savings Bank of Los Angeles, appeared by its counsel, Henry Merton.

Pursuant to the oral agreement of counsel, the petition of the Trustee was taken under submission pending the filing herein of a "Stipulation of Facts." Said "Stipulation of Facts" was duly filed on April 30, 1946 and a "Modification to Stipulation of Facts in re Order to Show Cause" was filed on May 7, 1946.

The Court having made and filed its Findings of Fact and Conclusions of Law constituting the decision of this Court in accordance therewith;

It Is Hereby Ordered, Adjudged and Declared:

I.

That the chattel mortgage covering the following described personal property executed by the above named bankrupts in favor of the Citizens National Trust and Savings Bank of Los Angeles, is void as against George Gardner, Trustee in Bankruptcy, to-wit: [27]

- 1 - 1936 Plymouth Sedan, Motor No. P2370259, Serial No. 1161805
- 1 - 1935 Ford Pickup Truck, Motor No. DR89610, Serial No. 18-2159920
- 1 - 1936 Willys Pickup Truck, Motor No. 77-45263, Serial No. 77-46946
- 1 - Air Compressor-Tank #5847, Motor #G.E. KP7056 with Kelley Compressor #95324
- 1 - Lincoln Water Pump grease gun Model 155
- 1 - Lincoln Universal grease gun Model 158
- 1 - Walltype spark plug cleaner
- 20 - Expansion Reamers
- 1 - Engine Analyzer
- 1 - Paint Machine and Mixer
- Tow Chains

- 1 – Tubula Flaring Machine, with Ridge Reamer and Ford Valve lifter (Bar Type)
Air Hoses and Attachments
Water Hoses and Attachments
- 1 – Wheel Puller and pinon puller
- 1 – Tire Tube Piston Tank
- 1 – Auto Parts Boiling on rollers
- 1 – Auto Parts Cleaning Tank
- 1 – Black & Decker Super Service Valve Shop Type K.W. #336210, with Vibro Centric Valve Seat Grinder Type B #A355607 and Stone Pressing Stand Type A #368482
- 1 – Manely Auto Tow Crane and Spout Lite #150-55578
- 1 – Westinghouse Battery Charger #954966B
- 1 – Booster Battery
- 1 – Manely Front End Machine and Attachments
- 1 – Grinder-Baldor Electric Buffer and Grinder, Type X20, #021111
- 1 – Large metal bench
- 1 – Small “ “
- 1 – Metal Cabinet Type Bench
- 1 – Chiskolm Moore Chain Hoist 1 ton
High Boys (oil)
Oil Can Drums
- 1 – complete Welding Outfit
- 1 – Pair Goggles
- 1 – Walker Floor Hdy Jack
Paint Spray Guns #6 Serial, #0681 Devilbliss – Shelbord and Attachments, Hose, Air Regulations cup
- 30 – Brake Reliner Wyman Marathon Electric Motor #023828

1 – Desk

1 – File Cabinets

1 – Chair

1 – Bench Type Vise

Billing Machines and Forms

3 – Sets Automobile Stands

1 – Brake Fluid Machine

1 – Battery Box and Filler

1 – Automobile tow dolly

II.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, is the owner of, and entitled to the possession of all those items of personal property more particularly described in the foregoing paragraph I, free and [28] clear of any right, title, interest, estate, claim or lien on the part of the Citizens Trust and Savings Bank of Los Angeles.

III.

That George Gardner, as Trustee in Bankruptcy of the above entitled bankrupt estates, has a right to have and apply the value of the said personal property free and clear of the purported lien of said chattel mortgage to the payment of the obligation of the bankrupt estates and for and on behalf of all the creditors of said bankrupt estates.

Done in Open Court This 14 Day of May, 1946.

HUGH L. DICKSON

Referee in Bankruptcy. [29]

DOCUMENT NO. 7

PETITION FOR REVIEW

To Hugh L. Dickson, Esquire, Referee in Bankruptcy:

The petition of Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, respectfully shows:

1. That petitioner is a creditor of the bankrupts;
2. That on May 14, 1946, an order was made by the Referee wherein and whereby it was ordered that a certain chattel mortgage, more particularly referred to in said order, executed by the Bankrupts in favor of petitioner Citizens National Trust & Savings Bank of Los Angeles is void as against George Gardner, Trustee in Bankruptcy. A copy of said Order is hereto annexed, marked Exhibit "A".
3. The said order is erroneous on the following grounds:
 - a. That said order is contrary to law.
 - b. That there is insufficient evidence to justify said order.
 - c. The conclusion of law, namely, that petitioner failed to comply with the Provisions of Section 3440 of the Civil Code of the State of California, made by the Referee as a ground for the said order, was erroneous in that said Section 3440 of the Civil Code of the State of California was inapplicable to the chattel mortgage herein referred to, in view of the circumstances under which said chattel mortgage was given, as disclosed by the evidence and findings of fact.
 - d. That the aforesaid conclusion of law in respect to said Section 3440 of the Civil Code of [30]

the State of California is erroneous in that said section could, under no circumstances be applicable to all of the property covered by said chattel mortgage.

e. That there is insufficient evidence to justify the findings of fact and/or conclusions of law of the Referee upon which the aforesaid Order was made, to the effect that petitioner failed to act promptly or diligently in causing the chattel mortgage to be recorded in the Office of the County Recorder of Los Angeles County or in depositing a certified copy of said chattel mortgage in the Motor Vehicle Department, Sacramento, California.

Wherefore, *petition* prays that said order be reviewed, vacated and set aside.

Dated: May 18th, 1946.

CITIZENS NATIONAL TRUST & SAVINGS
BANK OF LOS ANGELES, a National
Banking Association

By R. A. Britt, Vice President

Petitioner

Fifth and Spring Streets

Los Angeles, California

Attorney for Petitioner:

HENRY MERTON

1204 Loew's State Bldg.

707 South Broadway,

Los Angeles 14, TR 4907

[Verified.] [31]

(Exhibit "A" referred to in above Petition for Review is the same Order as Document No. 6 as set forth above.)

[Endorsed]: Filed Jun. 26, 1946. [32]

In the District Court of the United States
Southern District of California
Central Division

No. 44287-WM In Bankruptcy

In the Matter of

HERBERT G. RELL,

Bankrupt.

ORDER OF JUDGE ON PETITION FOR REVIEW
OF REFEREE'S ORDER OF MAY 14, 1946

At Los Angeles in said district on the 30th day of September, 1946,

Upon the petition for review of Citizens National Trust and Savings Bank of Los Angeles, filed May 20, 1946, and upon the certificate of Referee Hugh L. Dickson, filed herein June 26, 1946, and upon all proceedings had before the Referee as appears from the certificate, and upon hearing the petitioner, appearing by Henry Merton, Esquire, and the Trustee in Bankruptcy, appearing by Frank M. Chichester, Esquire,

It Is Ordered that the Order of the Referee entered on May 14, 1946, adjudging to be void as against the Trustee in Bankruptcy a certain chattel mortgage in favor of petitioner, be and said order herein sought to be reviewed is hereby confirmed.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

(1) Hugh L. Dickson, Esquire, the Referee;

(2) Henry Merton, Esquire, Attorney for the petitioner; and [33]

(3) Frank M. Chichester, Esquire, Attorney for the Trustee.

October 8, 1946.

WM. C. MATHES

United States District Judge

Judgment entered Oct. 8, 1946. Docketed Oct. 8, 1946. Book 9, page 556. Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed Oct. 8, 1946. [34]

[Title of District Court and Cause.]

No. 44287-WM

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS

Notice is hereby given that Citizens National Trust & Savings Bank of Los Angeles, a national banking association, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled court, the Honorable William C. Mathis, Judge Presiding, confirming an order of the referee entered on May 14, 1946, adjudging to be void as against the trustee in bankruptcy a certain chattel mortgage in favor of said Citizens National Trust & Savings Bank of Los Angeles. Said order of the Court, confirming said

referee's order, was filed and entered in the above proceedings on or about October 8, 1946.

Dated: October 28, 1946.

HENRY MERTON

Attorney for Appellant Citizens National Trust
& Savings Bank of Los Angeles

1204 Loew's State Building
Los Angeles 14, California

[Endorsed]: Filed & mld. copy to F. M. Chichester,
Atty. for Trustee, Oct. 28, 1946. [35]

[Title of District Court and Cause.]

No. 44287-WM

STATEMENT OF POINTS

The Appellant states that the points upon which it intends to rely in the appeal in this proceeding are as follows:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.

2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the two automobiles, to wit, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, included in said chattel mortgage, the regis-

tration of which and the possession of which were in Herbert G. Rell and Lovina Rell, his wife, prior to their purchase of the garage business and equipment from Andrew H. Wilson, and which automobiles were not purchased from said Andrew H. Wilson and were not at any time part of the equipment of his garage business.

3. The evidence, presented entirely by a written stipulation of facts, was insufficient to support the order of the [36] Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded in the Office of the County Recorder of Los Angeles County and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles in Sacramento, California. The evidence failed entirely to show any such failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded and causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California.

Dated: October 31, 1946.

HENRY MERTON

Attorney for Appellant [37]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 1, 1946. [38]

[Title of District Court and Cause.]

No. 44287-WM Bkcy.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 43 inclusive contain full, true and correct copies of Debtor's Petition; Orders of Adjudication and of General Reference; Referee's Certificate on Review and Documents Nos. 1 to 7, inclusive, attached thereto; Order of Judge on Petition for Review of Referee's Order of May 14, 1946; Notice of Appeal; Statement of Points; Designation of Portions of Record to be Contained in Record on Appeal; Supplementary Designation of Portions of Record to be Contained in Record on Appeal; and Affidavit of Service by Mail which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$11.75 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21 day of November, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11485. United States Circuit Court of Appeals for the Ninth Circuit. Citizens National Trust & Savings Bank of Los Angeles, Appellant, vs. George Gardner, Trustee in Bankruptcy of the Estate of Herbert G. Rell, Bankrupt, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the District Court of the United States
Southern District of California
Central Division

No. 44288-WM In Bankruptcy

In the Matter of

LOVINA RELL,

Bankrupt.

ORDER OF JUDGE ON PETITION FOR REVIEW
OF REFEREE'S ORDER OF MAY 14, 1946

At Los Angeles in said district on the 30th day of
September, 1946,

Upon the petition for review of Citizens National
Trust and Savings Bank of Los Angeles, filed May 20,
1946, and upon the certificate of Referee Hugh L. Dick-
son, filed herein June 26, 1946, and upon all proceedings
had before the Referee as appears from the certificate,
and upon hearing the petitioner, appearing by Henry
Merton, Esquire, and the Trustee in Bankruptcy, appear-
ing by Frank M. Chichester, Esquire,

It Is Ordered that the order of the Referee entered on
May 14, 1946, adjudging to be void as against the Trus-
tee in Bankruptcy a certain chattel mortgage in favor of
petitioner, be and said order herein sought to be reviewed
is hereby confirmed.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

- (1) Hugh L. Dickson, Esquire, the Referee;
- (2) Henry Merton, Esquire, Attorney for the petitioner; and [33]
- (3) Frank M. Chichester, Esquire, Attorney for the Trustee.

October 8, 1946.

WM. C. MATHES

United States District Judge

Judgment entered Oct. 8, 1946. Docketed Oct. 8, 1946. Book 9, page 558. Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed Oct. 8, 1946. [34]

[Title of District Court and Cause.]

No. 44288-WM

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Citizens National Trust & Savings Bank of Los Angeles, a national banking association, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled court, the Honorable William C. Mathis, Judge Presiding, confirming an order of the referee entered on May 14, 1946, adjudging to be void as against the trustee in bankruptcy a certain chattel mortgage in favor of said Citizens National Trust & Savings Bank

of Los Angeles. Said order of the Court, confirming said referee's order, was filed and entered in the above proceedings on or about October 8, 1946.

Dated: October 28, 1946.

HENRY MERTON

Attorney for Appellant Citizens National Trust
& Savings Bank of Los Angeles

1204 Loew's State Building
Los Angeles 14, California

[Endorsed]: Filed & mld. copy to F. M. Chichester,
Atty. for Trustee, Oct. 28, 1936. [35]

[Title of District Court and Cause.]

No. 44288-WM

STATEMENT OF POINTS

The Appellant states that the points upon which it intends to rely in the appeal in this proceeding are as follows:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.
2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the two automobiles, to wit, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, included in said chattel mortgage, the registration of which and the possession of which were in Herbert G. Rell and Lovina Rell, his wife, prior to their

purchase of the garage business and equipment from Andrew H. Wilson, and which automobiles were not purchased from said Andrew H. Wilson and were not at any time part of the equipment of his garage business.

3. The evidence, presented entirely by a written stipulation [36] of facts, was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles in Sacramento, California. The evidence failed entirely to show any such failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded and causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California.

Dated: October 31, 1946.

HENRY MERTON

Attorney for Appellant [37]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 1, 1946. [38]

[Title of District Court and Cause.]

No. 44288-WM-Bkcy.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 43 inclusive contain full, true and correct copies of Debtor's Petition; Orders of Adjudication and of General Reference; Referee's Certificate on Review and Documents Nos. 1 to 7, inclusive, attached thereto; Order of Judge on Petition for Review of Referee's Order of May 14, 1946; Notice of Appeal; Statement of Points; Designation of Portions of Record to be Contained in Record on Appeal; Supplementary Designation of Portions of Record to be Contained in Record of Appeal; and Affidavit of Service by Mail which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$11.75 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21 day of November, A. D. 1946.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy Clerk

[Endorsed]: No. 11486. United States Circuit Court of Appeals for the Ninth Circuit. Citizens National Trust & Savings Bank of Los Angeles, Appellant, vs. George Gardner, Trustee in Bankruptcy of the Estate of Lovina Rell, Bankrupt, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 22, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11485

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of
HERBERT G. RELL, Bankrupt, Appellee.

STATEMENT OF POINTS

The appellant, Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, states that the points upon which it intends to rely on the appeal in this action are as follows:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.
2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the two automobiles, to wit, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, included in said chattel mortgage, the ownership of which were acquired by Herbert G. Rell and Lovina Rell from other parties, and which were at no time part of the garage business and equipment purchased from Andrew H. Wilson.
3. The evidence, presented entirely by a written stipulation of facts, was insufficient to support the order of

the Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded in the Office of the County Recorder of Los Angeles County.

4. The evidence was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing a certified copy or certified copies of said chattel mortgage to be deposited with the Department of Motor Vehicles in Sacramento, California.

5. The evidence failed entirely to show any failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded with the County Recorder of Los Angeles County and/or causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California.

Dated: November 19, 1946.

HENRY MERTON

Attorney for Appellant

Henry Merton

1204 Loew's State Bldg.

Los Angeles 14, California

[Endorsed]: Filed Nov. 22, 1946. Paul P. O'Brien,
Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11486

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of
LOVINA RELL, Bankrupt,

Appellee.

STATEMENT OF POINTS

The appellant, Citizens National Trust & Savings Bank of Los Angeles, a National Banking Association, states that the points upon which it intends to rely on the appeal in this action are as follows:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.

2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the two automobiles, to wit, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, included in said chattel mortgage, the ownership of which were acquired by Herbert G. Rell and Lovina Rell from other parties, and which were at no time part of the garage business and equipment purchased from Andrew H. Wilson.

3. The evidence, presented entirely by a written stipulation of facts, was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded in the Office of the County Recorder of Los Angeles County.

4. The evidence was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy on the ground of failure of Appellant to act promptly or diligently in causing a certified copy or certified copies of said chattel mortgage to be deposited with the Department of Motor Vehicles in Sacramento, California.

5. The evidence failed entirely to show any failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded with the County Recorder of Los Angeles County and/or causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California.

Dated: November 19, 1946.

HENRY MERTON

Attorney for Appellant

Henry Merton
1204 Loew's State Bldg.
Los Angeles 14, California

[Endorsed]: Filed Nov. 22, 1946. Paul P. O'Brien,
Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11485

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Asso-
ciation,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of
HERBERT G. RELL, Bankrupt,

Appellee.

No. 11486

CITIZENS NATIONAL TRUST & SAVINGS BANK
OF LOS ANGELES, a National Banking Asso-
ciation,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of
LOVINA RELL, Bankrupt,

Appellee.

STIPULATION AND ORDER FOR
CONSOLIDATION OF ACTIONS

Whereas, the appeals pending before the above en-
titled Court in the matter of the above entitled proceed-
ings involve the same subject matter, questions and facts,

It Is Hereby Stipulated between Appellant and Appellee
in both of said causes, subject to the approval and order
of the Court, that both of said causes be consolidated for
hearing and determination, and that in this connection the
transcript of the records on appeal for both causes may
be printed and incorporated in a single printed volume,

and the briefs of the parties may be prepared and filed to include and be applicable to both of said causes.

Dated: November 19, 1946.

HENRY MERTON

Attorney for Appellant in both of the Above
Causes

FRANK M. CHICHESTER

Attorney for Appellee in Both of the Above
Causes

Henry Merton

1204 Loew's State Building

Los Angeles 14, California

Frank M. Chichester

617 South Olive Street

Los Angeles 14, California

ORDER OF CONSOLIDATION

Upon reading the above stipulation of counsel, and proper cause appearing,

It Is Hereby Ordered that the above entitled causes be consolidated for hearing and determination, and that in this connection the transcript of the records on appeal for both causes may be printed and incorporated in a single printed volume, and the briefs of the parties be prepared and filed to include and be applicable to both of said causes.

Dated: Nov. 23, 1946.

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 22, 1946. Paul P. O'Brien,
Clerk.

Nos. 11485-11486

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of HERBERT
G. RELL, Bankrupt,

Appellee,

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of LOVINA
RELL, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

HENRY MERTON,
1204 Loew's State Building, Los Angeles 14,
Attorney for Appellant.

and the briefs of the parties may be prepared and filed to include and be applicable to both of said causes.

Dated: November 19, 1946.

HENRY MERTON

Attorney for Appellant in both of the Above
Causes

FRANK M. CHICHESTER

Attorney for Appellee in Both of the Above
Causes

Henry Merton

1204 Loew's State Building

Los Angeles 14, California

Frank M. Chichester

617 South Olive Street

Los Angeles 14, California

ORDER OF CONSOLIDATION

Upon reading the above stipulation of counsel, and proper cause appearing,

It Is Hereby Ordered that the above entitled causes be consolidated for hearing and determination, and that in this connection the transcript of the records on appeal for both causes may be printed and incorporated in a single printed volume, and the briefs of the parties be prepared and filed to include and be applicable to both of said causes.

Dated: Nov. 23, 1946.

FRANCIS A. GARRECHT

Senior United States Circuit Judge

[Endorsed]: Filed Nov. 22, 1946. Paul P. O'Brien,
Clerk.

Nos. 11485-11486

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of HERBERT
G. RELL, Bankrupt,

Appellee,

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of LOVINA
RELL, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

HENRY MERTON,
1204 Loew's State Building, Los Angeles 14,
Attorney for Appellant.

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IN THE

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GEORGE GARDNER, as Trustee of the Estate of HERBERT
G. RELL, Bankrupt,

Appellee,

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of LOVINA
RELL, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

On March 6, 1946, Herbert G. Rell and Lovina Rell filed, respectively, their voluntary petitions in bankruptcy in the District Court of the United States, Southern District of California. On March 6, 1946 orders were made by said District Court, the Honorable William C. Mathis,

Judge Presiding, adjudicating the said Herbert G. Rell and Lovina Rell bankrupts (Bankruptcy Act, Section 4 (a) (11 USCA) Section 22 (a)), and referring proceedings to the Honorable Hugh L. Dickson, one of the Referees in bankruptcy of said court. George Gardner was duly appointed as Trustee of the Estate of each of said Bankrupts, qualified as such and since has been and is now the Trustee of said estates. The Appellant Citizens National Trust & Savings Bank of Los Angeles is a national banking association organized and existing under and by virtue of the laws of the United States of America. Said national banking association is listed as a secured creditor in the schedules of liabilities of said bankrupts filed in the proceedings. The amount of the indebtedness of the bankrupts to Appellant so listed and claimed was Twenty-Eight Hundred Ten (\$2810.00) Dollars and claimed to be secured by a chattel mortgage on one 1936 Plymouth Sedan, one 1935 Ford pick-up, truck, one 1936 Willys pick-up truck, one air compressor tank, and miscellaneous tools and equipment ordinarily used by a garage owner or machinist. The approximate value of said automobiles, air compressor tank, tools and equipment is \$5,000.00.

On or about April 15, 1946, the Trustee filed a petition for Order to Show Cause in said bankruptcy proceedings wherein he sought the issuance of an order requiring Appellant Bank to show cause, if any it had, why an order should not be made declaring the chattel mortgage to be void and of no effect as against the Trustee. Said petition was premised on the Trustee's allegations that no notice of intention to chattel mortgage the personal property referred to was ever published in a newspaper of general

circulation within the township within which said chattel mortgage was made, pursuant to the provisions of Section 3440 of the Civil Code of the State of California, and further that Appellant Bank had failed to file for record a copy of said chattel mortgage within a "reasonable time" following its "execution." By stipulation said petition was deemed to be amended to include an allegation of the Trustee to the effect that no certified copy of the chattel mortgage was "promptly deposited" with the Department of Motor Vehicles of the State of California at Sacramento, California.

The matter was finally submitted to the Honorable Hugh L. Dickson, Referee, on a written Stipulation of Facts. His Findings of Fact and Conclusions were made and on May 14, 1946, the Referee made his order pursuant to said Findings of Fact and Conclusions of Law that the trustee was the owner of and entitled to the possession of all of the items of personal property covered by said chattel mortgage, free and clear of any right, title, interest, estate, claim or lien of Appellant Bank; that said Trustee has a right to have and apply the value of the said personal property, free and clear of the purported lien of said chattel mortgage, to the payment of the obligations of the bankrupts' estates and for and on behalf of all the creditors of said bankrupts.

On or about May 18, 1946, Appellant as the mortgagee, filed its Petition for Review by the Judge of the order made by said Referee. On September 30, 1946, said petition was submitted to the Court, Honorable William C. Mathis, judge presiding, and on or about October 8, 1946, an order was made and entered by said Court affirming the order of the Referee made May 14, 1946, adjudging to be

void as against the trustee in bankruptcy said chattel mortgage.

On October 28, 1946, Notices of Appeal to the Circuit Court of Appeals for the Ninth Circuit was duly filed from said Order of the Court confirming Order of the Referee entered May 14, 1946, as aforesaid. (Bankruptcy Act, Section 24 (a) as amended by Act of May 27, 1946, Chap. 406, Section 9 (11 U. S. C. A., Section 47(a).)

Statement of the Case.

On March 6, 1946, Herbert G. Rell and Lovina Rell filed their voluntary petitions in bankruptcy in the District Court of the United States, Southern District of California, Central Division.

Both parties were adjudicated bankrupts on March 6, 1946, and orders were made referring the proceedings in both cases to the Honorable Hugh L. Dickson, one of the Referees in Bankruptcy of said Court.

The chattel mortgage, the validity of which is herein involved was executed by both the said Herbert G. Rell and Lovina Rell.

Herbert G. Rell, and Lovina Rell, on May 4, 1945, being prior to their bankruptcy, entered into an escrow to purchase a garage business and its equipment located in Los Angeles, California, from one Andrew H. Wilson. The parties to the escrow were said Andrew H. Wilson, as the vendor; Said Herbert G. Rell and Lovina Rell, as the purchasers; and the Appellant Citizens National Trust & Savings Bank of Los Angeles, as a lender of funds to Herbert G. Rell and Lovina Rell to enable them

to pay the full purchase price demanded by the Vendor. The Appellant Bank was to receive a chattel mortgage at close of escrow, executed by Herbert G. Rell and Lovina Rell, on the equipment to be sold [Tr. pp. 15 and 16], and, in addition, a Willys pick-up truck, 1936 model, and a Plymouth Sedan, 1926 model, acquired or to be acquired by the Rells independent from the transaction for the purchase of the garage business, to secure the payment of its loan. [Tr. p. 21.] The chattel mortgage was made and executed by Herbert G. Rell and Lovina Rell under date of May 4, 1945, being the date of the opening of the escrow and deposited in said escrow on said day. The usual notice of intended sale by the Vendor, Andrew H. Wilson, was recorded and published pursuant to the provisions of Section 3440 of the Civil Code of the State of California. However, no publication of a Notice of Intention of Herbert G. Rell and Lovina Rell to chattel mortgage the property they intended to purchase from Andrew H. Wilson, and/or the two automobiles they had acquired or were acquiring independently of their intended purchase of the garage business, was ever published in a newspaper of general circulation within the township within which the said chattel mortgage was made, or, as provided in said Section 3440 of the Civil Code of the State of California, in the case of an intended mortgage of the fixtures or store equipment of a garage owner.

The escrow was closed on May 19, 1945. [Tr. p. 16.] On said date, the escrow depository disbursed the funds to the vendor, Andrew H. Wilson; delivered the bill of sale to the garage business and equipment to Herbert G. Rell and Lovina Rell; and delivered the chattel mortgage to the Appellant Bank. [Tr. p. 16.]

The Trustee in Bankruptcy, in a petition filed and presented for hearing before the Referee sought to have the chattel mortgage declared void on the grounds (a) The failure on the part of the mortgagor or the mortgagee named in the chattel mortgage to publish a notice of intention to chattel mortgage the equipment purchased by the bankrupt from Andrew H. Wilson, in compliance with the provisions of Section 3440 of the Civil Code of the State of California; (b) The failure of Appellant to record a copy of said chattel mortgage within a reasonable time following its execution, in the Office of the County Recorder of Los Angeles County, California; (c) No certified copy of the chattel mortgage was promptly deposited with the Department of Motor Vehicles of the State of California at Sacramento.

The matter was submitted to the Referee on a written stipulation of facts. The Referee made his order May 14, 1946, pursuant to his Findings of Fact and Conclusions of Law declaring said chattel mortgage void as against the Trustee in Bankruptcy and that the Trustee is the owner of and entitled to the possession of all items of personal property described in the mortgage, free and clear of any right, title, interest, estate, claim, or lien on the part of Appellant Bank. The matter was reviewed on Petition for Review by the District Judge, Honorable William C. Mathis, and on or about October 8, 1946, an order was made by said District Judge and entered, affirming the order of the Referee adjudging to be void as against the Trustee in Bankruptcy the said chattel mortgage.

It is the contention of Appellant that the provisions of Section 3440 of the Civil Code of the State of California

are not applicable to the chattel mortgage here involved; that the evidence, presented entirely by a written stipulation of facts, was insufficient to support the order of the Court adjudging the chattel mortgage void as against the trustee in bankruptcy, either on the ground of the failure of appellant to act promptly or diligently in causing the chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County, and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles at Sacramento, or on any ground.

The Stipulation of Facts omitted any mention as to when the chattel mortgage was recorded. However, the Court found, and it is admitted as true, that it was recorded in the Office of the County Recorder of Los Angeles County, California, on May 24, 1945, which was within a period of five days from close of escrow, and within a period of five days from the delivery of said chattel mortgage to Appellant at close of escrow.

The ownership certificates to the three automobiles included in the chattel mortgage, and which are required to accompany a certified copy of the chattel mortgage when deposited in the Department of Motor Vehicles in Sacramento (Sec. 195 Vehicle Code), were not delivered to Appellant Bank at close of escrow and were not, in fact, delivered to Appellant until the 3rd or 4th of June, 1945. The reason for this was that all of the ownership certificates were in the Motor Vehicle Department in Sacra-

mento at the time the escrow closed. They had been in the Motor Vehicle Department to effect transfers of ownership in the following particulars:

(a) The ownership of the Ford Pick-up truck sold by Andrew H. Wilson to Herbert G. Rell and Lovina Rell through said escrow was being transferred from a third party to the vendor, Andrew H. Wilson.

(b) The ownership of the Willys Pick-up truck, which was not purchased from said Andrew H. Wilson, was being transferred to Herbert G. Rell and Lovina Rell, the bankrupts, from a third party.

(c) The ownership of the Plymouth Sedan, which was also not purchased from Andrew H. Wilson, was being transferred to the bankrupts by Bank of America, pursuant to the discharge of a chattel mortgage held by said bank. [Tr. pp 18, 19 and 21.]

When Appellant discovered, at close of escrow that it could not then get delivery of the ownership certificates to the respective motor vehicles, it requested the bankrupts to sign, and they did so sign, a form of trust receipt setting forth, in effect, that they acknowledged holding in trust for Appellant documents or instruments evidencing the ownership of the automobiles, and undertook therein to deliver the ownership certificates in proper form to Appellant when they received them from the Department of Motor Vehicles. [Tr. pp. 18 and 19.]

A certified copy of the chattel mortgage was sent by Appellant, accompanied by the ownership certificates duly

endorsed, registration cards and fee, to the Department of Motor Vehicles in Sacramento for recordation on June 8, 1945, or a period of four days, or five days at most, from the time of the receipt by Appellant of said ownership certificates. [Tr. p. 19.] The details of the chattel mortgage loan were attended to by a department of Appellant Bank for that purpose, which consisted of a central office for handling hundreds of automobile loans secured by chattel mortgages for some thirty-four branches of the Bank. [Tr. p. 19.]

The ownership certificate on the Ford Pick-up truck, was sent with a certified copy of chattel mortgage to said Department of Motor Vehicles, also for the further purpose of having the *ownership* on this motor vehicle transferred from Andrew H. Wilson, the vendor, to the bankrupts. It is the Appellant's contention that the question of the applicability of Section 3440 of the Civil Code of the State of California could, in no event, involve the two automobiles acquired by the bankrupts independently of their purchase of the garage business from Andrew H. Wilson, as these two motor vehicles were not a part of the equipment of the garage business sold to and mortgaged by the vendees. It is also Appellant's contention that the charge made by the Trustee, and sustained by the Court, that Appellant failed to act promptly or diligently in causing the chattel mortgage to be recorded with the Motor Vehicle Department in Sacramento could only concern the validity of the mortgage on the automobiles, and not the remainder of the property included in the mortgage.

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(a) The ownership of the Ford Pick-up truck sold by Andrew H. Wilson to Herbert G. Rell and Lovina Rell through said escrow was being transferred from a third party to the vendor, Andrew H. Wilson.

(b) The ownership of the Willys Pick-up truck, which was not purchased from said Andrew H. Wilson, was being transferred to Herbert G. Rell and Lovina Rell, the bankrupts, from a third party.

(c) The ownership of the Plymouth Sedan, which was also not purchased from Andrew H. Wilson, was being transferred to the bankrupts by Bank of America, pursuant to the discharge of a chattel mortgage held by said bank. [Tr. pp 18, 19 and 21.]

When Appellant discovered, at close of escrow that it could not then get delivery of the ownership certificates to the respective motor vehicles, it requested the bankrupts to sign, and they did so sign, a form of trust receipt setting forth, in effect, that they acknowledged holding in trust for Appellant documents or instruments evidencing the ownership of the automobiles, and undertook therein to deliver the ownership certificates in proper form to Appellant when they received them from the Department of Motor Vehicles. [Tr. pp. 18 and 19.]

A certified copy of the chattel mortgage was sent by Appellant, accompanied by the ownership certificates duly

endorsed, registration cards and fee, to the Department of Motor Vehicles in Sacramento for recordation on June 8, 1945, or a period of four days, or five days at most, from the time of the receipt by Appellant of said ownership certificates. [Tr. p. 19.] The details of the chattel mortgage loan were attended to by a department of Appellant Bank for that purpose, which consisted of a central office for handling hundreds of automobile loans secured by chattel mortgages for some thirty-four branches of the Bank. [Tr. p. 19.]

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The pertinent provisions of Section 3440 of the Civil Code of the State of California involved in this appeal are as follows:

“ . . . sale, transfer, assignment, or mortgage of the fixtures or store equipment of a . . . garage owner . . . will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor, or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee, shall record in the office of the County Recorder in the county or counties in which the said . . . fixtures or equipment are situated, a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendee, transferee, assignee, or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid; and shall publish a copy of such notice in a newspaper of general circulation published in the township in which said transfer or assignment is intended to be made, if there be one, and if there be none in such township, then in such newspaper in the county embracing such township, at least once, which publication shall be completed at least not less than two days before the completion of such sale, transfer, assignment or mortgage. . . .”

The pertinent provisions of Section 195 of the Vehicle Code of the State of California involved in this appeal are as follows:

“No chattel mortgage on any vehicle registered hereunder, irrespective of whether such registration was effected prior or subsequent to the execution of said mortgage, is valid as to creditors of the mortgagor, subsequent purchasers, or encumbrancers, until the mortgagor or his successor or assignee has deposited with the Department at its office in Sacramento, a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage, if said vehicle is then registered hereunder, or, if said vehicle is not so registered, by an application in the usual form for a registration, together with an application for registration as legal owner, and upon payment of the fees as provided in this Code.”

The pertinent provisions of Section 2957 of the Civil Code of the State of California involved in this appeal are as follows:

“The mortgage of personal property . . . is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value unless: . . .
(4) The mortgage, if of personal property other than crops growing or to be grown, or animated personal property, is recorded in the office of the Recorder of the County where the mortgagor resides

at the time the mortgage is executed, and also in the County where the property mortgaged is located, at the time the mortgage is executed, and to which such property is thereafter removed.”

Specifications of Error.

Appellant specifies that the following errors were committed by the trial court:

1. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the chattel mortgage.

2. The Court erred in determining that the provisions of Section 3440 of the Civil Code of the State of California were applicable to the Willys Pick-up truck and the Plymouth Sedan included in the chattel mortgage, which were not purchased by the bankrupts from Andrew H. Wilson and, therefore, were not at any time a part of the equipment of the garage business purchased.

3. The evidence, presented entirely by a written stipulation of facts, is insufficient to support the order of the Court adjudging the chattel mortgage void as against the Trustee in bankruptcy on the ground of failure of Appellant to act promptly and diligently in causing said chattel mortgage to be recorded in the office of the County Recorder of Los Angeles County and/or causing a certified copy or certified copies to be deposited with the Department of Motor Vehicles at Sacramento California. The evidence failed entirely to show any such failure on the part of Appellant to act promptly or diligently in causing said chattel mortgage to be recorded and causing a certified copy or certified copies thereof to be deposited with the Motor Vehicle Department, Sacramento, California. [Tr. pp. 17 to 22.]

ARGUMENT.

I.

The Trial Court Erred in Determining That the Provisions of Section 3440 of the Civil Code of the State of California Were Applicable to the Chattel Mortgage.

The purpose of 3440 of the Civil Code is to prevent the defrauding of creditors by disposition of a debtor's assets. 12 Cal. Jur. 955, Sec. 3. In the instant case the debtors were *acquiring* assets. With the exception of the two automobiles included in the mortgage, ownership of which the bankrupts were acquiring from other parties, the debtors at no time owned or possessed a greater estate in the equipment of the garage business they had purchased from Andrew H. Wilson than *an ownership subject to the chattel mortgage involved in this case*. The bankrupts had no title to said garage business and equipment, with the incidents of ownership, namely, possession and enjoyment, prior to close of escrow. At close of escrow the ownership of said equipment passed to the bankrupts *subject to the chattel mortgage*. It follows, therefore, that creditors of the bankrupts could not possibly have been defrauded by the giving of the chattel mortgage, or indeed, in any way affected.

Section 3440 Civil Code provides for the publishing and recording of a seven-day notice of intention to mortgage the store equipment of a "garage owner." The bankrupts were not "garage owners" at any time before an effective chattel mortgage was given. *The Vendor Andrew H. Wilson* was the garage owner and owner of the mortgaged equipment during all the period preceding the giving of the mortgage at close of escrow, and there

was no period preceding its effective date wherein the bankrupts could qualify as "garage owners" to conform to a notice of intention to mortgage as provided in Section 3440 Civil Code.

In the case of *J. G. Beckjord v. Wm. I. Traeger, as Sheriff, etc.*, 3 Cal. App. (2d) 385, the mortgagor of the equipment or fixtures of a market had acquired a lease on the premises at the same time the mortgage was given. It was held that Section 3440 Civil Code was not applicable to the chattel mortgage as the mortgagor had not carried on the business of the market and it was not, as to him, a going concern until *after* the mortgage was given. A petition to have this case heard in the Supreme Court was denied. In the instant case the garage purchased by the bankrupts was not a going concern as to them until *after* an effective chattel mortgage was given.

In the case of *Rosum Utilities*, 25 Fed. Supp. 626 (1938), affirmed C. C. A., 105 Fed. Rep. (2d) 132, a like situation arose as in the case here. In that case the question involved was the applicability of the New York Bulk Sales Statute (230A Lien Law), similar to 3440 of the Civil Code of California, to a purchase-money chattel mortgage. The Court stated: "The mortgagor did not effect the creditors' rights by the execution of a purchase-money mortgage, as they had no interest in the chattels which were being purchased by the mortgagor. The creditors of the mortgagor could not possibly have been defrauded or deceived." The Circuit Court of Appeals, in affirming the decision, stated "No fraud on creditors is effected where a merchant adds to his stock by taking his goods subject to a purchase-money mortgage."

II.

The Court Erred in Determining That the Provisions of Section 3440 of the Civil Code of the State of California Were Applicable to the Two Automobiles, To Wit, a Willys Pick-up Truck, 1936 Model, and a Plymouth Sedan, 1936 Model, Included in Said Chattel Mortgage, the Ownership of Which Were Acquired by Herbert G. Rell and Lovina Rell From Other Parties, and Which Were at No Time Part of the Garage Business and Equipment Purchased From Andrew H. Wilson.

Included in the chattel mortgage were two automobiles, namely, a Willys Pick-up truck, 1936 model, and a Plymouth Sedan, 1936 model, the ownership of which the bankrupts were acquiring from parties other than Andrew H. Wilson, the vendor of the garage business. [Tr. p. 21.] These motor vehicles were not, therefore, a part of the garage equipment purchased by the bankrupts. They were not, therefore, at any time prior to the delivery of the mortgage at close of escrow a part of the fixtures or store equipment of a garage owner. The applicable provisions of 3440 Civil Code have reference only to the sale, transfer, assignment or mortgage of the "fixture or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant." It is therefore respectfully submitted that as these two motor vehicles, included in the chattel mortgage, were none of these things as mentioned in said Code Section, the provisions of said Sections were not applicable.

III.

The Evidence, Presented Entirely by a Written Stipulation of Facts, Was Insufficient to Support the Order of the Court Adjudging the Chattel Mortgage Void as Against the Trustee in Bankruptcy on the Ground of Failure of Appellant to Act Promptly or Diligently in Causing Said Chattel Mortgage to Be Recorded in the Office of the County Recorder of Los Angeles County.

It is respectfully submitted that the point raised by the trustee in bankruptcy to the effect that the appellant bank failed to act promptly or diligently in causing the chattel mortgage to be recorded in the Office of the County Recorder is more conjured up than real. This is apparent from his petition for order to show cause filed with and presented to the Referee. [Tr. pp. 11 to 14, incl.] In Paragraph VIII of said petition [Tr. p. 13] the trustee uses the language “. . . and by virtue of the failure of said respondent to file for record a copy of said Chattel Mortgage within a reasonable time following its *execution*, the said Chattel Mortgage is void and of no effect as against your Petitioner.”

It is submitted that the date of the *execution* of the chattel mortgage is not the date to be measured in relation to the time of its recording with the County Recorder. Obviously, the mortgage could not be recorded prior to its delivery to the mortgagee at close of escrow. The mortgage did not become an effective chattel mortgage until that time. The escrow closed May 19, 1945, and

the mortgage was recorded in the Office of the County Recorder in Los Angeles County on May 24, 1945. This was within a period of *five* days.

A thorough search has been made of the cases relating to the question of diligent recording of chattel mortgages. No case has been found, and it is believed none will be found, holding that a brief period of *five* days constitutes unreasonable delay in recording a chattel mortgage from the time the mortgage was given or became an effective chattel mortgage.

Especially, as in the instant case, where the mortgagee is a large lending institution handling hundreds of chattel mortgage loans, through a central office for some thirty-four branch banks [Tr. p. 19] does it appear that five days is an unreasonable length of time in which to cause a chattel mortgage to be recorded. If this period of five days from the time of the delivery of the mortgage to the time of its recording constitutes unreasonable delay, the validity of the mortgage would only be affected as to those creditors of the mortgagor who became creditors during the interval between the time of delivery at close of escrow and the time of recordation, and it would not be entirely void, or void as to all creditors of the mortgagors.

Schwartzler v. Lemas, 11 Cal App. (2d) 442;

Wolpert v. Gripton, 213 Cal. 474.

IV.

The Evidence Was Insufficient to Support the Order of the Court Adjudging the Chattel Mortgage Void as Against the Trustee in Bankruptcy on the Ground of Failure of Appellant to Act Promptly or Diligently in Causing a Certified Copy or Certified Copies of Said Chattel Mortgage to Be Deposited With the Department of Motor Vehicles in Sacramento, California.

It is submitted that the point raised by the Trustee to the effect that the Appellant Bank failed to act promptly or diligently in causing a certified copy of its chattel mortgage to be deposited with the Department of Motor Vehicles in Sacramento is also more or less conjured up than real. The ownership certificates must accompany the certified copy of the chattel mortgage when deposited with the Department of Motor Vehicles in Sacramento for registration. (Sec. 195 Vehicle Code of the State of California.)

At the time the escrow closed ownership of the three automobiles was not registered in the Bankrupts. No effective registration of the chattel mortgage could be made until ownership of the vehicles was duly registered in the Bankrupts and ownership certificates issued accordingly.

When the escrow closed no ownership certificates on the automobiles were available for delivery to the mortgagee bank. At that time, and for some time prior thereto, ownership of these cars was in the process of being transferred in the Department of Motor Vehicles in Sacramento. The Ford Pick-up truck was being transferred from some third person to the vendor Wilson.

The ownership to the remaining two cars was being transferred from other persons to the Bankrupts. It was not until the 3rd or 4th of June, 1945 when the ownership certificates were delivered to the mortgagee bank. [Tr. p. 19.]

On June 8, 1945, being within a period of five days from the time of the delivery of the ownership certificates to the Appellant a certified copy of the chattel mortgage accompanied by the ownership certificates was forwarded for deposit with the Department of Motor Vehicles in Sacramento. No cases have been found, and it is believed none will be found, wherein a period of five days is held to be an unreasonable delay in causing a certified copy of a chattel mortgage on an automobile to be deposited with the Department of Motor Vehicles at Sacramento.

It can be said that in respect to the Ford Pick-up truck there was no measurable period of delay in depositing the chattel mortgage in Sacramento with the Department of Motor Vehicles. The ownership of this vehicle had been just recently transferred from another party to Andrew H. Wilson and the certificate of ownership delivered to the bank on this motor vehicle showed it as issued in the name of Andrew H. Wilson as owner and bearing the endorsement of Andrew H. Wilson for transfer to the bankrupts. This ownership certificate was sent to the Department of Motor Vehicles with a certified copy of the chattel mortgage to accomplish two things; firstly, to transfer the ownership thereof from Wilson to the bankrupts, and secondly, to register the chattel mortgage given thereon by the bankrupts. Thus, a certified copy of the chattel mortgage was on deposit with the Depart-

ment of Motor Vehicles, at the moment when transfer of ownership of this vehicle was made to the mortgagors.

It is submitted that if there is indeed any merit to the Trustee's charge of undue delay by Appellant in causing the certified copy of the chattel mortgage to be deposited with the Department of Motor Vehicles, it would only affect the validity of the chattel mortgage as to the three automobiles and as to the creditors of the mortgagors who became creditors during the time when a certified copy of an effective chattel mortgage could be deposited with the Department and the time when the same was in fact so deposited.

Schwartzler v. Lemas, 11 Cal. App. (2d) 442;

Wolpert v. Gripton, 213 Cal. 474.

Conclusion.

The order of the Court upon which this appeal is taken renders the chattel mortgage involved herein entirely void and of no effect as if it had never been given in the first instance. As this mortgage was in the nature of a purchase-money mortgage, in that the proceeds of the mortgage loan were all applied toward the purchase and acquisition of the property by the mortgagors, the result of the order cancelling out entirely the mortgage lien on the property is to hand over to the Trustee in bankruptcy for the benefit of all the mortgagors' creditors, and to the detriment of the mortgagee without whose loan the property would not have been purchased by the mortgagors, an estate greater than the mortgagors ever owned or possessed.

It is submitted that not only does the language of Section 3440 of the Civil Code exclude this mortgage from

its application, because the mortgagor was not a “garage owner” until after an effective chattel mortgage was given, but it was never intended in the enactment of this Code provision that chattel mortgages of this nature should be subject to its provisions in that no possible prejudice could result to the creditors of the mortgagors.

In so far as the charge is made by the Trustee that there was undue delay or lack of diligence in causing the chattel mortgage to be recorded with the County Recorder and deposited with the Department of Motor Vehicles, it is submitted that the facts speak for themselves and that no further comment is necessary in this conclusion to support Appellant’s contention that said charge is without merit.

Appellant, therefore, respectfully submits that the order heretofore entered, adjudging the chattel mortgage to be void as against the Trustee in Bankruptcy, be reversed.

Respectfully submitted,

HENRY MERTON,

Attorney for Appellant.

Nos. 11485-11486.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert
G. Rell, Bankrupt,

Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina Rell,
Bankrupt,

Appellee.

APPELLEE'S BRIEF.

FILED

FEB 26 1947

PAUL P. O'BRIEN

FRANK M. CHICHESTER,
607 James Oviott Building, Los Angeles 14.
Attorney for Appellee.



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GEORGE GARDNER, as Trustee of the Estate of Lovina Rell,
Bankrupt,

Appellee.

APPELLEES' BRIEF.

Statement of the Case.

The statement of the case as set forth in appellant's opening brief is essentially correct, but certain observations should be made to clarify the statement in so far as the appellee's contentions are concerned. Pages 4 and 5 of the brief recite that the appellant was to lend funds to enable the bankrupts to pay the *full* purchase price demanded by the vendor. This is not a correct statement of the facts. [Tr. pp. 16, 24, 29.] From the references to

the transcript it is to be noted that only a part of the purchase price was to be loaned to the bankrupts by the appellant, and the sum of \$1,000.00 was to be paid outside of escrow to the vendor Wilson. In addition to such payment the bankrupt executed and delivered a promissory note for \$1,000.00 outside of escrow in favor of the vendor Wilson, which promissory note was secured by a second chattel mortgage reciting therein that it was to be junior to the chattel mortgage of the appellant.

Included within the security described in the chattel mortgage in question [Tr. p. 32] are a Plymouth Sedan automobile and a Willys Pick-up truck, which vehicles were not being purchased by the bankrupts from the vendor Wilson. [Tr. p. 21.] The bankrupts were the owners of the Plymouth Sedan automobile prior to the execution of the chattel mortgage, to-wit, May 4, 1945, and, at the same time the Willys Pick-up truck was being acquired by the bankrupts. These are important distinctions, as will subsequently appear from the appellee's argument.

A further observation is made relative to the statement of the case (App. Br. p. 5) referring to the escrow depository. At all times it should be remembered, in considering the position of the appellant, that a department of the appellant acted as the escrow depository over which the appellant had complete control, and any dereliction on the part of the escrow depository in not properly handling the chattel mortgage in question as required by the laws of California must, of necessity, be attributed to the appellant. The fiction of two arms operating independently under one head should not be indulged in to excuse the failure on the part of the appellant in handling the chattel mortgage.

ARGUMENT.

I.

The Law Relative to Chattel Mortgages Must Be Strictly Construed.

Any person who claims a lien upon personal property as security for a debt must conform strictly with the statutes giving rise to such lien, and failure to so conform will render a chattel mortgage invalid as against claims of creditors of the mortgagor.

“The authority for the creation of Chattel Mortgages in California derives its force from the statutory provisions relating to the subject, and all rights accruing by virtue of such mortgage can be protected and conserved only by fully meeting the requirements of the statute and strictly observing its provisions.”

5 *Cal. Jur.* 50;

Hopper v. Keys, 152 Cal. 488, 92 Pac. 1017.

The following is a quotation from Judge James' opinion in *In re Fox West Coast Theatres*, 4 Fed. Supp. 692:

“It is held by the California Courts that the provisions of the law as to the contents of a Chattel Mortgage are applied strictly and that the Mortgagee must see that they are complied with at the penalty of loss of his security as against claims of creditors of the lessee.” (Mortgagor) citing, *Kahrman v. Jones*, 203 Cal. 254, 263 Pac. 537.

In the recent California case of *Rolando v. Everett*, 72 Cal. App. (2d) 629, 165 P. (2d) 33, decided on January 22, 1946, the validity of a chattel mortgage as against creditors of the mortgagor was attacked on the ground that the form of acknowledgment used in the execution

of the chattel mortgage executed by a partnership did not conform with the statutory requirement. The Court discussed the form of acknowledgment used which was the ordinary form of acknowledgment prescribed by Section 1189, Civil Code of the State of California, and discussed the form prescribed by Section 1190a of the Civil Code and concluded that there had not been a substantial compliance with the statutory provision. As a result the chattel mortgage was held to be void as against creditors of the mortgagor.

This most recent case reemphasizes the strict compliance with the laws of the State of California required to give effect to a Chattel Mortgage as against creditors of a Mortgagor. The above citations and quotations have been set forth herein as the primary basis for the Trustee's contention that the subject chattel mortgage is void as to the trustee in bankruptcy. Regardless of the excuses given by the appellant for the failure to strictly comply with the California laws in the execution and recording of its chattel mortgage, there appears to be no escape from the strict application of those laws.

II.

The Chattel Mortgage Is Not a Purchase Money Mortgage.

In commercial practice a purchase money mortgage is considered to be one given by a vendee to a vendor as payment or consideration for the property purchased. Thus, A sells property to B, and, in lieu of paying cash therefor, B executes a promissory note secured by a chattel mortgage on the actual property so sold. The facts in the instant case disclose that part of the property, excluding the 1936 Plymouth Sedan automobile and the 1936

Willys Pick-up truck, was sold to the bankrupts for which a consideration was paid to the vendor. A further and additional consideration was paid by the bankrupts to the vendor in the sum of \$2,000.00, represented by \$1,000.00 in cash and a promissory note secured by a junior chattel mortgage for an additional \$1,000.00. However, in the preparation of the chattel mortgage, the appellant included all of the property that the bankrupts owned or intended to acquire, and the result was that the chattel mortgage was removed from the category of a purchase money mortgage, hence, the case of *Rosom Utilities*, 105 F. (2d) 132 is not applicable. Furthermore, the strict construction placed by the California courts upon the execution of chattel mortgages would strongly indicate that even as regards a purchase money mortgage the letter of the statute must be followed to make it effective as against creditors of the mortgagor. The case of *Rolando v. Everett*, 72 Cal. App. (2d) 629 is the latest and strongest statement of strict construction, turning upon a bare technicality which supports the appellee's contention that purchase money mortgages are no exceptions to the laws pertaining to their execution and recording. Sections 2957 and 3440 of the California Civil Code have been on the statute books for many years. Likewise purchase money mortgages have been in commercial use for as many years. The California legislature during all of this time could have included within the statutes pertaining to chattel mortgages an exception in so far as purchase money mortgages are concerned, but even though the California Appellate Courts have repeatedly construed with strictness these laws pertaining to chattel mortgages, the legislature has not seen fit to exclude from their operation a purchase money mortgage. However desirable, it does not

seem to be within the province of the California Appellate Courts to legislate upon the subject of chattel mortgages, and, particularly in view of the fact that chattel mortgages are in derogation of the common law. Any legislation thereon should emanate from the proper legislative body.

III.

Failure to Publish a Notice of Intention to Chattel Mortgage Renders the Chattel Mortgage Void as to Existing Creditors of the Mortgagor.

It is clear that a notice of intention to chattel mortgage was not published in a newspaper of general circulation within the township in which the chattel mortgage was made. Such a requirement is contained in Section 3440 of the California Civil Code as amended by the Statutes of 1945, Ch. 1071, Sec. 1.

Undoubtedly the appellant intended to publish such a notice [Tr. p. 17] but for some unexplained reason it failed. Perhaps the hundreds of automobile loans secured by chattel mortgages then being handled by the appellant [Tr. p. 19] might account for the oversight in this particular case. Nevertheless, this failure is sufficient in itself to render the chattel mortgage void, in so far as it pertains to the fixtures or equipment of a garage owner; in other words, all of the property described in the chattel mortgage except the three automobiles.

A recent California case, *Malaquias v. Novo*, 59 Cal. App. (2d) 225, 138 P. (2d) 729, holds that a conveyance is void for failure to publish a copy of the notice of sale in a newspaper of general circulation as required by Section 3440, California Civil Code. The same authority would apply in the case of a chattel mortgage.

IV.

Unless a Chattel Mortgage Is Recorded Immediately Following Its Execution It Shall Be Void as to Creditors of the Mortgagor.

The chattel mortgage involved herein was executed on May 4, 1945, and was recorded in the office of the County Recorder of Los Angeles County on May 24, 1945. (App. Br. p. 7.) Such a delay from the date of execution to the date of recording has been held sufficient to render a chattel mortgage void as to creditors:

Williams v. Belling, 76 Cal. App. 610, 245 Pac. 455 (14 days delay);

Swift v. Higgins (C. C. A. 9), 72 F. (2d) 791 (28 days delay);

In re Hansen, 268 Fed. 904 (1 month and 12 days delay).

V.

The Trustee Has a Right to Contest the Validity of the Chattel Mortgage.

At the time of the execution of the chattel mortgage involved, the bankrupts were indebted to various creditors. [Tr. p. 20.] The transcript citation discloses that through inadvertence the word "trustee" was used in the stipulation when it should have been the word "bankrupt." This was an oversight that was corrected by interlineation in the proceedings before the lower court, but apparently has not been corrected for the purposes of this appeal. Hence, the transcript, page 20, should read

"it is further stipulated by and between the parties, through their respective counsel, that there is on file in these proceedings schedules of the *bankrupts* listing claims of certain creditors which purport to have

existed prior to the giving of the chattel mortgage herein.”

A trustee in bankruptcy represents all of the creditors, and a chattel mortgage which is void, is void as to creditors who became such subsequent to its recording, as well as those existing prior to its recording. (*Moore v. Bay*, 284 U. S. 5; 76 L. Ed. 133; 76 A. L. R. 1200.)

VI.

The Failure to Properly Record the Chattel Mortgage With the California Department of Motor Vehicles Renders It Void as to Existing Creditors.

The facts pertaining to the deposit with the Department of Motor Vehicles for the State of California of a certified copy of the chattel mortgage are somewhat vague. The appellant attempted to disclose these facts from its records, and called upon one of its employees to give his best recollection of what transpired. [Tr. pp. 18, 19 and 20.] While it does not appear in the stipulated facts, it is counsel's recollection that the certificate of ownership covering the Ford truck described in the chattel mortgage was in the possession of the appellant on May 21, 1945, at which time it could have been sent to the Department of Motor Vehicles together with a certified copy of the chattel mortgage. Apparently the appellant desired to send all three certificates of ownership together with one certified copy of the mortgage and waited until June 8, 1945 to do so. Following that date, and on June 29, 1945, the appellant was notified by the Department of Motor Vehicles that there was some defect in the recording of the chattel mortgage, either in the amount of fees deposited, or in the nature of the endorsements on the docu-

ments. [Tr. p. 19.] Whether the chattel mortgage and the certificates of ownership were then returned to the appellant is not clear. The fact remains that the appellant does not appear to have been registered as the legal owner of the three motor vehicles in the Department of Motor Vehicles, Sacramento, California, until July 20, 1945.

The various delays involved in finally registering the appellant as the mortgagee-legal owner with the California Motor Vehicle Department may be summarized as follows:

1. May 4, 1945 (date of execution and acknowledgment of mortgage) to July 20, 1945 (date appellant appears registered as legal owner with Motor Vehicle Department) . . . 2 months, 16 days delay.
2. May 21, 1945 (date certificate of ownership for Ford truck came into possession of appellant) to July 20, 1945 (date appellant appears registered as legal owner of Ford truck with Motor Vehicle Department) . . . 1 month, 29 days delay.
3. June 8, 1945 (date three certificates of ownership and certified copy of Chattel Mortgage were first mailed to Motor Vehicle Department) to July 20, 1945 (date appellant appears registered as legal owner of three motor vehicles with Motor Vehicle Department) . . . 1 month, 12 days delay.
4. June 29, 1945 (date of last notice to appellant that the registration of chattel mortgage was defective) to July 20, 1945 (date appellant was registered as legal owner) . . . 21 days delay.

The authorities are clear in California that a chattel mortgage on an automobile must be recorded promptly and failure to so record it renders it void as to all creditors, whether the debts were incurred prior to or subsequent to its execution.

National Bank of Bakersfield v. Moore, 247 Fed. 913.

Bank of America v. Sampsell, 114 F. (2d) 211 (C. C. A. 9).

Nor shall a chattel mortgage be valid until the mortgagee is registered as the legal owner.

Vehicle Code, State of California, Sec. 195;

Eckhardt v. Morley, 220 Cal. 229, 30 P. (2d) 423;

Chilhar v. Acme Garage, 18 Cal. App. (2d) (Supp.) 775, 61 P. (2d) 1232.

Again applying the principle of strict construction as quoted above in *Hopper v. Keys*, and in 5 Cal. Jur. 50, the burden was upon the appellant to strictly comply with the provisions of Section 195, California Vehicle Code.

Conclusion.

From all of the facts available it would seem to be apparent that the appellant has not been vigilant in protecting its rights as a secured creditor under the chattel mortgage in question. Certainly it had every opportunity to comply with the law pertaining to the execution and recording of chattel mortgages. It had complete control of the escrow and it could have required the parties involved to do anything it deemed necessary to make itself secure. There appears to be no reason why the chattel mortgage should have been executed on the date that it bears, to-wit, May

4, 1945. Its execution could have been withheld until notice of intention to execute had been duly published and until the certificates of ownership covering the three motor vehicles were in the possession of the escrow holder to be thereafter promptly deposited with the Motor Vehicle Department along with a certified copy of the chattel mortgage and the requisite fees. The failure to comply with the law is directly attributable to the appellant and its agents. Such failure to do all that the law required in the execution and recording of the chattel mortgage is sufficient to invalidate it as to creditors now represented by the trustee in bankruptcy.

Respectfully submitted,

FRANK M. CHICHESTER,

Attorney for Appellee.

Nos. 11485-11486.

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Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert G.
Rell, Bankrupt,
Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,
Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina
Rell, Bankrupt,
Appellee.

APPELLANT'S REPLY BRIEF.

FILED

MAR 5 - 1947

HENRY MERTON PAUL P. O'BRIEN,
1204 Loew's State Building, Los Angeles 14, **CLERK**
Attorney for Appellant.



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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,
Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert G.
Rell, Bankrupt,
Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS
ANGELES, a National Banking Association,
Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina
Rell, Bankrupt,
Appellee.

APPELLANT'S REPLY BRIEF.

I.

Under the title of "Statement of the Case," appellee charges appellant with making an incorrect statement of fact where it states in its opening brief that as a party to the escrow, appellant was a lender of funds "to enable the bankrupts to pay the *full* purchase price demanded by

the vendor.” For appellee to charge this statement as incorrect he must give it a meaning different from what is intended by appellant. It is true that appellant’s loan was to enable the bankrupts to pay the full purchase price demanded by the vendor Wilson for his garage business. It was made for no other purpose than that. Appellant does not say and it is not contended that the amount of the loan equals the total purchase price or consideration demanded by the vendor.

II.

Paragraph I of appellee’s Argument cites authorities on the point that the law relative to chattel mortgages must be strictly construed. Nothing in said paragraph shows noncompliance of the law by appellant or answers appellant’s points and authorities.

III.

In Paragraph II of appellee’s Argument, under the title “The Chattel Is Not a Purchase Money Mortgage,” he proceeds to define a purchase money mortgage, asserting in effect, among other things, that unless the mortgage is for the full purchase price it is not a purchase money mortgage. His main purpose, however, is to attempt to nullify the applicability of the case of *Rosum Utilities*, 105 F. (2d) 132, to the chattel mortgage involved here. To proceed to define what or what may not be labeled a purchase money mortgage is to sidetrack the basic, logic and reason for the decision in that case. It is submitted that it matters not whether the chattel mortgage paid all or part of the total purchase price, or whether the chattel mortgage is to the vendor or to a third party who entered into the transaction jointly with the buyer and the seller in effecting the transaction. The substance and effect is

the same; namely, that the buyer is *acquiring* assets rather than disposing of his assets; that he acquires no greater estate in the mortgaged property than one subject to the chattel mortgage; that it is impossible for the buyer's creditors to be defrauded by reason of the chattel mortgage, or in any way affected.

Giving support to appellee's contention that the law must be strictly construed, it is submitted that Section 3440 of the Civil Code is not applicable to the chattel mortgage here involved because the buyer was not a "garage owner" until *after* the chattel mortgage was given. The code section applies only to the equipment of a "garage owner." *We are not here concerned with the creditors of Andrew H. Wilson, the vendor.* Wilson was the "garage owner" right up till the time of the close of the escrow and delivery of the chattel mortgage to the appellant.

Appellee cites the case of *Rolando v. Everett*, 72 Cal. App. (2d) 629. This case deals only with the question of strict conformance to the law in respect to certificates of acknowledgment on chattel mortgages.

IV.

It is submitted that Paragraph III of appellee's argument fails to answer points raised by appellant in support of its contention that Section 3440 of the Civil Code is not applicable to the chattel mortgage involved. Appellee merely emphasizes the fact that no notice of intention to chattel mortgage was published in a newspaper of general circulation in connection with said mortgage and assumes "that the appellant intended to publish such a notice but for some unexplained reason had failed."

V.

In Paragraph IV of appellee's argument, he insists again on taking the *date* appearing on the chattel mortgage, to wit, May 4, 1945, to the date of its recording in the Office of the County Recorder, to wit, May 24, 1945, as the measure of time in charging undue delay in its recordation. Appellant, in its opening brief, has submitted that the date appearing on the chattel mortgage cannot with logic and reason be the date from which to measure the time of recordation or determine the question of undue delay in recordation. For the appellee to insist that such date prevails and not the date of delivery at close of escrow is grossly unsound.

Needless to say the document never became a mortgage until the escrow closed and the mortgagee had no right to it or any dominion over it until such time. The case of *Williams v. Belling*, 76 Cal. App. 610, cited by appellee, points out that any presumption that an instrument was executed and delivered on the day it bears date is disputable, and may be overcome, and the stipulated facts in this case clearly show that the mortgage was not delivered to the appellant until close of escrow on May 19, 1945.

VI.

Paragraph V of appellee's argument asserts the right of the trustee to contest the validity of the chattel mortgage. The trustee's right to contest the validity of the chattel mortgage is not questioned. The appellee cites an authority to the effect that a void chattel mortgage is void as to all creditors. He fails, however, to give any reason to hold that the chattel mortgage involved here is entirely void.

VII.

Paragraph VI of appellee's brief deals with the subject of the deposit of the chattel mortgage with the Department of Motor Vehicles. It is submitted that appellee uses dates which are *not the real dates* from which to determine the question of any undue delay in depositing a certified copy of the chattel mortgage with the Department of Motor Vehicles. To point this out specifically, reference is made to page 9 of appellee's brief wherein he gives his summarization, arriving at conclusions in respect to periods of time, which, it is respectfully submitted, are misleading.

In Paragraph 1 of said summarization appellee states as a conclusion that there was "2 months, 16 days delay." Appellee arrives at this conclusion by once more taking the date the mortgage bears; namely, May 4, 1945, rather than the date of its delivery and its effectiveness as a mortgage, which was at close of escrow on May 19, 1945. Appellant also takes the date of July 20, 1945, on which he says appellant appears registered as legal owner with the Motor Vehicle Department. The law in effect at the time the chattel mortgage was given in respect to registration of the motor vehicles was the Vehicle Code of the State of California. Section 195 of said code, which became effective January 1, 1936, was applicable. This section provides that no chattel mortgage or any vehicle registered under the act is valid as against creditors until the mortgagee has *deposited* with the Department a copy of said mortgage. Section 196 of said Vehicle Code provides that "*when the chattel mortgagee has deposited with the Department a copy of the chattel mortgage as provided in Section 195, such deposit constitutes constructive notice of said mortgage and its contents to creditors.*"

Thus, we respectfully point out that the registration, or the date of registration, of the chattel mortgage is not the governing date in respect to notice to creditors, but it is the date of the *deposit* of the chattel mortgage which governs.

In Paragraph 2 of appellee's said summarization, appellee takes the date of May 21, 1945, as being the date when the certificate of ownership for the Ford Truck came into the possession of appellant. Appellee acknowledges in the first part of his Paragraph VI of his argument that this date does not appear in the stipulated facts. It is submitted that appellee cannot go beyond the stipulated facts, or contrary to them. The stipulated facts show that the ownership certificates and registration cards on the automobiles were delivered to appellant on the 3rd or 4th of June, 1945. [Tr. p. 19.] Appellee again uses the date on which appellant appears registered as legal owner of the Ford truck; namely, July 20, 1945, and ignores the date of the *deposit* of a certified copy of the chattel mortgage with the Department of Motor Vehicles, to wit, on June 8, 1945. It is from this that appellee makes his statement, which is submitted as incorrect and misleading, viz., "1 month, 29 days delay."

In Paragraph 3 he uses the date of the deposit of the certified copy of the chattel mortgage with the Department of Motor Vehicles; namely, June 8, 1945, and then proceeds to take the date showing the registration of the appellant as the legal owner; namely, July 20, 1945. It is submitted that this is also not the yardstick to measure delay under the Vehicle Code.

In Paragraph 4 of said summarization appellee resorts to a very misleading statement to arrive at his conclusion

of "21 days delay." Here he says that "June 29, 1945, was the date of last notice to appellant that the registration of chattel mortgage was defective." *This does not appear in the Stipulation of Facts and the statement is so framed as to be misleading.* The Stipulation of Facts [Tr. p. 19] states that on June 29 respondent received a letter from the Department of Motor Vehicles stating in effect that there was a technical defect, the exact nature of which the witness could not remember, but it was either insufficient fee transmitted with said documents, or incorrect endorsement of a name.

The Stipulation of Facts does *not* say that the letter referred to gave notice "that the registration of the chattel mortgage was defective" or that it was a "last notice." The defect may have been in Andrew H. Wilson's endorsement for transfer of ownership of the Ford Pick-up truck to the bankrupts, a matter occurring *before* delivery of this ownership certificate to appellant bank. The point to be made, however, is that neither of the parties to this controversy can indulge in speculations, but are confined entirely and exclusively to the Stipulation of Facts. Thus, it can be said with certainty that the Stipulation of Facts does not point to any specific defect, the avoidance of which was under the control of appellant or was due to any act or omission of appellant.

VIII.

We come now to another statement made by appellee following his summarization in Paragraph VI of his argument which is both misleading and incorrect. Appellee makes the statement that "Nor shall a chattel mortgage be valid until the mortgagee is *registered* as the legal owner." (Appellee's Reply Brief p. 10.) To support this appellee

cites the Vehicle Code, Sec. 195. This does *not* support appellee's statement. On the contrary it states in effect that no chattel mortgage on any vehicle is valid as against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has *deposited* in the office at Sacramento a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage.

Appellee cites *Eckhardt v. Morley*, 220 Cal. 229. This case is inapplicable because the decision is based on the law in effect in 1932. The law then in effect and which the decision refers to is the California Vehicle Act, Sections 45½, 49 and 77 thereof. Section 45½ of said act did then provide that no chattel mortgage on a motor vehicle shall be valid until the mortgagee is registered as a legal owner. This act and the provisions thereof referred to were repealed by the Vehicle Code. (Vehicle Code, Secs. 802 and 803.) The case of *Chilhar v. Acme Garage*, 18 Cal. App. (2d) (Supp.) 775, also cited by appellee, is inapplicable because the decision is premised on the now repealed California Vehicle Act. However, this case involved a situation where no copy of the chattel mortgage was ever deposited with the Department of Motor Vehicles and the mortgage, therefore, was defective under the old act and would be under the prevailing one.

It is suggested that the legislature in substituting the words "deposit" in place of "registration" in respect to point of time as to the effectiveness of a chattel mortgage on creditors or subsequent purchasers or encumbrancers of the mortgagor may have had in mind that ac-

tual registration and the time thereof depends upon performance of the clerical work of the staff of the Motor Vehicle Department, and is beyond the control of the mortgagor and mortgagee. It is to be noted also that in Section 186 of the Vehicle Code ownership of motor vehicles is transferred, as to point of time, not when the registration is effected, but upon the *deposit* with the Department of the endorsed ownership certificate and registration card. Said section specifically provides that no transfer of title or interest in a motor vehicle registered in that department can pass and be effective until the *deposit* of the ownership certificate and registration card. It may be observed at this point that none of the bankrupts' creditors could have any interest in the motor vehicles *prior* to the bankrupts themselves acquiring ownership in the manner prescribed in the Motor Vehicle Code.

Respectfully submitted,

HENRY MERTON,

Attorney for Appellant.

No. 11491

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY CO., a partnership,
Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price
Administration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JAN 24 1947

PAUL P. O'BRIEN, CLERK

No. 11491

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY CO., a partnership,
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Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

LAZARUS AND HORGAN,

639 S. Spring St.,

Los Angeles 14, Calif.

For Appellee:

TOWSON T. MacLAREN,

ELEANOR SHUR,

1206 S. Santee St.,

Los Angeles 15, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
Southern District of California
Central Division
No. 5638-WM

PAUL A. PORTER, Administrator, Office of Price
Administration,

Plaintiff,

vs.

J. H. ZEIGLER, ALLEN ZEIGLER, RAYMOND
ZEIGLER, PAUL ZEIGLER, JOHN DOE
and RICHARD ROE, individually and as
partners doing business as WEST COAST
SUPPLY CO., and WEST COAST SUPPLY
CO., a partnership,

Defendants.

COMPLAINT FOR INJUNCTION

Now comes the plaintiff in the above entitled
matter and for cause of action alleges:

I.

This action arises under Section 2(a)-6 of Title
3 of the 2nd War Powers Act, as amended (56
Stat. 176, 50 U.S.C. App., Section 631, et seq.).

II.

That pursuant to the delegation of authority
granted the Price Administrator under Section 2(a)

of Title 3 of the 2nd War Powers Act, as amended, there was duly issued by the said Price Administrator, and at all times mentioned herein there was in effect Third Revised Ration Order No. 3, as amended (II Fed. Reg. 177), providing for the allocation and distribution of sugar. [2]

III.

That J. H. Zeigler, Allen Zeigler, Raymond Zeigler, Paul Zeigler, John Doe and Richard Roe are partners doing business under the firm name and style of West Coast Supply Co., with a place of business at 1654 Long Beach Avenue, City of Los Angeles, County of Los Angeles, State of California, within the jurisdiction of this Court.

IV.

That John Doe and Richard Roe named as partners above are persons whose true identity is to your plaintiff unknown and he asks that their true names may be substituted when their identity becomes known.

V.

That the said defendants are engaged in the business of dealing with sugar and are subject to the provisions of Third Revised Ration Order No. 3 (hereinafter referred to as 3 R.R.O. 3) (11 F.R. 177) as a "wholesaler" within the meaning of such 3 R.R.O. 3.

VI.

That on July 11, 1946 the defendants had a sugar ration balance to their credit in the Union Bank and Trust Company of Los Angeles of 23,196 pounds of sugar; that between July 11, 1946 and August 7, 1946, the said defendants did draw and issue and use in payment for sugar four checks totaling 1,370,000 pounds.

VII.

That the said defendants have made no deposits in the said Union Bank and Trust Company to cover the amounts of the said checks, and that the sugar ration bank account of the said defendants is now overdrawn in the amount of 1,346,804 pounds.

VIII.

That the said defendants hold title to and have control of substantial amounts of sugar at their place of business at 1654 Long Beach Avenue, City of Los Angeles, Los Angeles County, State of California; and 100,000 pounds of sugar held subject to their control and at their order by the Union Terminal Warehouse, at 737 Terminal Street, City of Los Angeles, County of Los Angeles, State of California. [3]

IX.

That the defendants, by overdrawing their sugar ration bank account and by accepting delivery and control of sugar obtained by means of invalid sugar

ration banking checks, have violated the provisions of the said 3rd R. R. O. No. 3, as amended.

X.

That unless the defendants are restrained from issuing further sugar ration banking checks and from overdrawing their ration bank account and from using or permitting the use or otherwise disposing of the sugar now subject to their order and control, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

Wherefore, the plaintiff respectfully requests the Court to grant:

1. A preliminary and final injunction—

a. Restraining and enjoining the defendants from issuing sugar ration banking checks in violation of Third Revised Ration Order No. 3.

b. Restraining and enjoining the defendants from using or permitting the use of or otherwise disposing of any and all sugar now owned by or subject to the control of the said defendants, except in such manner as shall be directed by this Court.

c. Restraining and enjoining the defendants from violating any and all of the provisions of Third Revised Ration Order No. 3 as heretofore or hereinafter amended; and

2. For such other and further relief as the

Court may deem just and proper under the circumstances.

TOWSON T. MacLAREN,
District Enforcement Attorney,

FRANCIS E. HARRINGTON,
Special Trial Attorney,

By /s/ FRANCIS E. HARRINGTON,
Attorneys for the Plaintiff.

[Endorsed]: Filed Aug. 9, 1946. [4]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER.

It appearing that the Plaintiff has filed a verified complaint in the above entitled action demanding a preliminary and final injunction and praying that a temporary restraining order be issued without notice, and it further appearing from the affidavits of Edwin A. Poehlman and Homer Lee Pouett. Jr., filed in support thereof; that the Defendants will continue to issue sugar ration banking checks without having in their ration bank account a balance sufficient to cover the amount of such checks; and will use and dispose of and put beyond their possession and control sugar obtained by means of invalid sugar ration checks, such checks having been issued to pay for sugar by the Defendants

when at the time their ration book account did not contain a balance sufficient to pay the weight value of such checks; that such checks have been issued in [5] violation of Third Revised Ration Order No. 3, as amended; that such sugar has been obtained by the Defendants in violation of the said Third Revised Ration Order No. 3, as amended; and that further violations are likely to occur, and the above-mentioned sugar is likely to be disposed of, before notice can be served and a hearing had on plaintiff's application for a preliminary injunction;

And good cause appearing therefor:

It Is Hereby Ordered that the Defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with the Defendants, be and they are hereby enjoined and restrained (1) from issuing any sugar ration checks or evidences to any person, and (2) from using or permitting the use or otherwise disposing in any way of any sugar now in their custody, or under their control, or subject to their order, from the date of the service of this order, to and including the further order of the Court.

It Is Further Ordered, that the Defendants herein show cause, if any there be, before the above entitled court on the 19 day of August, 1946, at 10:00 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Wm. C. Mathes, Judge of the said court, at Court Room 2 in the United States Courts and Postoffice Building, Temple and Spring Streets, in the city of Los

Angeles, County of Los Angeles, State of California, why a preliminary injunction should not issue enjoining the Defendants from issuing sugar ration banking checks, and from using or permitting the use, or otherwise disposing, of any sugar now in their control or possession, or subject to their order, except in accordance with the order of this Court.

It Is Further Ordered, that this temporary restraining order shall remain in full force and effect until the 20 day of August, 1946, or until further ordered by this court.

Issued in the City of Los Angeles, County of Los Angeles, State of California at 9 a.m. on the 10 day of August, 1946.

/s/ WM. C. MATHES,
Judge. [6]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE FOR PRELIMINARY IN-
JUNCTION.

State of California,
County of Los Angeles—ss.

Edwin A. Poehlman, being first duly sworn, deposes and says:

That he is now and has been since February 1,

1946 the duly appointed and acting District Sugar Rationing Officer of the Office of Price Administration for the Los Angeles District Office; that in such capacity he is charged with the administration of sugar rationing for the said District; that in the course of his official duties he has had occasion to inquire into the sugar rationing allotments and accounts of the West Coast Supply Company; that official records of the Office of Price Administration in his custody disclose that the West Coast Supply Company is a "wholesaler" within the meaning of Third Revised Ration Order No. 3; that as such wholesaler and in [7] accordance with the provisions of Third Revised Ration Order No. 3, the said West Coast Supply Company maintains a ration banking account with the Union Bank and Trust Company of Los Angeles; that your affiant has been advised by the said Union Bank and Trust Company that as of August 6, 1946, the said West Coast Supply Company had overdrawn its ration banking account to the extent of 1,346,804 pounds; that your affiant requested the Union Bank and Trust Company to submit a statement of such account and that the said bank sent to your affiant a statement, a photostat of which is attached to this affidavit; that the allowable inventory of the West Coast Supply Company, or the total amount of sugar and/or sugar evidences it should normally or regularly have on hand is 36,627 pounds, or less than three (3%) per-cent of the amount of such overdraft; that your affiant believes that the said West Coast Supply Company will be unable to

make deposits in its bank account of sugar ration evidences sufficient to cover the amount of the said overdraft; that a proceeding is now pending and set for hearing on August 13, 1946 before a duly appointed Hearing Commissioner of the Office of Price Administration to determine whether the right of the said West Coast Supply Company to deal with sugar should be suspended or revoked; that the supply of sugar available for use by persons entitled thereto in the Los Angeles District is in short supply; that the overdrafts issued by the West Coast Sugar Supply Company are liable to deprive persons legitimately entitled to sugar of the right and opportunity to obtain such sugar; that overdrafts of a ration bank account are prohibited by Section 15.7(d) of Third Revised Ration Order No. 3, which reads as follows: "Overdraft prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."; and your affiant further states that unless the said West Coast Supply Company is restrained and enjoined from issuing further checks in violation of Third Revised Ration Order No. 3 and is enjoined and restrained from using sugar acquired by means of checks drawn without amounts sufficient to cover them, that the rationing program for sugar will be imperiled and the general public and persons [8] legitimately entitled to have and use

the sugar will suffer from such violations by the said West Coast Supply Company.

/s/ EDWIN A. POEHLMAN,

Subscribed and sworn to before me this 9th day of August, 1946.

[Seal] /s/ SAMUEL R. GARB,

Notary Public in and for said
County and State.

My Commission expires February 4, 1949. [9]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE FOR PRELIMINARY IN-
JUNCTION.

State of California,
County of Los Angeles—ss.

Homer Lee Pruett, Jr., being first duly sworn,
deposes and says:

That he now is, and at all times mentioned herein has been, a Special Agent with the Division of Special Investigations, Office of Price Administration; that in the course of his official duties he was required to visit the place of business of the Union Terminal Warehouse, 737 Terminal Street, Los

Angeles, California, on August 9, 1946; that in the offices of the Union Terminal Warehouse he examined records of that company in the custody and possession of Mr. B. F. Johnston, Vice-President and General Manager of said company; that such records disclosed that a New York Central freight car No. 152555, delivered 1,000 one-hundred-pound bags of sugar to the warehouse [10] for the benefit of the West Coast Supply Co. on July 1, 1946; that a Western Pacific freight car No. 196558, delivered 1,000 one-hundred-pound bags of sugar to the warehouse for the benefit of the West Coast Supply Co. on July 3, 1946; that a Southern Pacific freight car No. 34247, delivered 1,000 one-hundred-pound bags of sugar to the warehouse for the benefit of the West Coast Supply Co. on July 29, 1946; that a Rock Island freight car No. 147259, delivered 1,000 one-hundred-pound bags of sugar to the warehouse for the benefit of the West Coast Supply Co. on July 3, 1946; that the records of the Union Terminal Warehouse disclose that there is presently stored in that warehouse and held for the benefit of the West Coast Supply Co., 100,000 pounds of sugar; and that the records of the Union Terminal Warehouse and the records of the shipments above mentioned do not show that any person other than the West Coast Supply Co. has any interest in such sugar or freight shipments of sugar; that the records of the Union Terminal Warehouse disclose that the larger part of the sugar above referred to has been delivered to the West Coast Supply Co. and that acknowledgment of delivery has been made

by one Robert A. Russell, Agent for the said West Coast Supply Co.

/s/ HOMER LEE PRUETT, JR.

Subscribed and sworn to before me this 9th day of August, 1946.

[Seal] /s/ SAMUEL R. GARB,

Notary Public in and for said
County and State.

My Commission expires February 4, 1949. [11]

Statement
In account with
UNION BANK & TRUST CO.
of Los Angeles

Savings Commercial Trust
Los Angeles, Cal.

Sugar

WEST COAST SUPPLY CO.**WHOLESALE

Checks	Deposits	Date	Balance
Balance forwarded July 11 '46			231.96
6,000.00		July 25 '46	5,768.04 od
300.00	6,600.00	800.00	Aug. 1 '46 13,468.04 od

The above is a certified copy of the statement sheets in our files from July 11, 1946 to Aug. 1, 1946.

UNION BANK & TRUST CO.
of Los Angeles
/s/ R. HARTT.

[Endorsed]: Filed Aug. 10, 1946. [12]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER.

It appearing that the plaintiff has filed a verified complaint in the above entitled action demanding a preliminary and final injunction and praying that a temporary restraining order be issued without notice; and it further appearing from the affidavits of Edwin A. Poehlman and Homer Lee Pruett, Jr., filed August 10, 1946 in support thereof that the defendants and each of them will continue to issue sugar ration banking checks without having in their ration bank account a balance sufficient to cover the amount of such checks, and will use and dispose of and but beyond their possession and control sugar obtained by means of invalid sugar ration checks, such checks having been issued to pay for sugar by the defendants and each of them at a time when their ration bank account did not contain a balance sufficient [13] to pay the weight value of such checks; and it further appearing that such checks have been issued in violation of Third Revised Ration Order No. 3, as amended, and such sugar has been obtained by the defendants and each of them in violation of the said Third Revised Ration Order No. 3, as amended; and it further appearing that violations are likely to occur, and the above-mentioned sugar is likely to be disposed of before notice can be served and a hearing had on plaintiff's application for a preliminary injunc-

tion; and it further appearing that, although the defendants, Allen Zeigler, Raymond Zeigler and West Coast Supply Co., a partnership. were served with the order to show cause and a temporary restraining order in this matter and appeared before the Honorable William C. Mathes, Judge of the United States District Court, by counsel, on August 26, 1946 on plaintiff's application for a preliminary injunction, and the court herein at said time ordered that a preliminary injunction be issued against the said Allen Zeigler, Raymond Zeigler and West Coast Supply Co., the defendants J. H. Zeigler and Paul Zeigler individually and as co-partners, doing business with other individual defendants herein as West Coast Supply Co., have never been served with the order to show cause for preliminary injunction and temporary restraining order herein and have never appeared thereon;

And good cause appearing therefor:

It Is Hereby Ordered that the defendants J. H. Zeigler and Paul Zeigler individually and as co-partners, doing business with the other individual defendants herein as West Coast Supply Co., their officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendants and each of them be and they are hereby enjoined and restrained from issuing any sugar ration checks or evidences to any person, and from using or permitting the use or otherwise disposing in any way of any sugar now in their custody, or under their control, or subject to their order

from the date of the service of this order, to and including the further order of this court.

It Is Further Ordered that the defendants J. H. Zeigler and Paul Zeigler individually and as co-partners, doing business with the other [14] individual defendants herein as West Coast Supply Co., show cause, if any there be, before the above entitled court on the 5th day of September, 1946, at 10 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable William C. Mathes, Judge of the said court, at courtroom 2, in the United States Courts and Postoffice Building, Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, why a preliminary injunction should not issue enjoining the defendants J. H. Zeigler and Paul Zeigler individually and as co-partners, doing business with the other individual defendants herein as West Coast Supply Co., from issuing sugar ration banking checks, and from using or permitting the use, or otherwise disposing, of any sugar now in their control or possession, or subject to their order, except in accordance with the order of this court.

It Is Further Ordered that this temporary restraining order shall remain in full force and effect until the 5th day of September, 1946, or until further ordered by this court.

Issued in the City of Los Angeles, County of Los

Angeles, States of California at 4:05 p.m., on the 26th day of August, 1946.

/s/ WM. C. MATHES,

Judge.

[Endorsed]: Filed Aug. 26, 1946. [15]

[Title of District Court and Cause.]

INTERLOCUTORY FINDINGS OF FACT AND
CONCLUSIONS OF LAW UPON APPLI-
CATION FOR PRELIMINARY INJUNC-
TION.

This matter coming on for hearing before the Honorable William C. Mathes on August 26, 1946 on an order to show cause why preliminary injunction should not be issued restraining and enjoining defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co. and each of them from issuing any sugar ration bank checks in violation of Third Revised Ration Order No. 3, as amended, and from using or permitting the use of or otherwise disposing of any and all sugar now owned by or subject to the control of said defendants and each of them, or from violating any and all provisions of Third Revised Ration Order No. 3, as heretofore or hereafter amended, the plaintiff being represented by Eleanor Shur, Enforcement Attorney for the Office of Price Administration, and the defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co. being represented by William U. Handy, Es-

quire, and evidence submitted by way of affidavit by [16] plaintiff and the arguments of counsel for the parties all being considered, the court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co. are engaged in the business of dealing in sugar and are subject to the provisions of Third Revised Ration Order No. 3, as amended.

2. Defendants Allen Zeigler and Raymond Zeigler, with other persons, are partners doing business under the firm name and style of West Coast Supply Co., a co-partnership, with a place of business located in the City of Los Angeles, County of Los Angeles, State of California, and within the jurisdiction of this court.

3. Defendants and each of them have issued invalid sugar ration checks to pay for sugar at a time when their ration bank account did not contain a balance sufficient to pay the weight value of such checks.

4. As of August 6, 1946 the sugar ration bank account of the West Coast Supply Co. showed an overdraft of 1,346,804 pounds of sugar.

5. The allowable sugar inventory of the West Coast Supply Co. or the total amount of sugar and sugar evidences said partnership should normally have on hand is 36,627 pounds.

6. Records in the possession of the Union Terminal Warehouse on August 9, 1946 showed that 1,000 one-hundred-pound bags of sugar were delivered to the warehouse of said Union Terminal Warehouse for the benefit of the West Coast Supply Co. on July 1, 1946, that two such deliveries were made on July 3, 1946, and one more such delivery again was made on July 29, 1946. Said records further show that on August 9, 1946 said warehouse had in storage one hundred thousand (100,000) pounds of sugar for and on behalf of the West Coast Supply Co.

7. Unless restrained and enjoined defendants and each of them threaten to and will continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

8. Unless restrained and enjoined defendants and each of them threaten to and will use and dispose of and put beyond their possession and [17] control sugar obtained by means of invalid sugar ration bank checks.

9. Unless defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

10. Unless defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar.

Conclusions of Law

1. The action herein is brought pursuant to the provisions of Section 2(a)-6, Title 3, of the "Second War Powers Act".

2. Jurisdiction of this action and jurisdiction to issue the preliminary injunction herein lies within this court, pursuant to the provisions of said Section 2(a)-6 of said "Second War Powers Act".

3. At all times pertinent hereto Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a), Title 3, of the "Second War Powers Act", was and still is in effect.

4. Said Third Revised Ration Order No. 3, as amended, provides in Section 15.7(d) as follows:

"Overdrafts prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the

amount of outstanding checks drawn on that account.”

5. Said Third Revised Ration Order No. 3, as amended, further provides in Section 22.10 thereof as follows:

“Unlawful use or possession. No person shall at any [18] time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this order.”

6. Defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co. and each of them have violated said provisions of Third Revised Ration Order No. 3, as amended, in issuing checks in excess of the balance in their sugar ration bank account and in obtaining, using, having in their possession or under their control or taking delivery of sugar obtained with invalid sugar ration checks.

7. On all of the facts and conclusions of law herein set forth, a preliminary injunction, as prayed for by plaintiff herein, shall be issued against defendants Allen Zeigler, Raymond Zeigler and the West Coast Supply Co.

Dated this 13th day of September, 1946.

/s/ WM. C. MATHES,
Judge.

Service of a copy of the above proposed Findings of Fact and Conclusions of Law is hereby acknowledged.

Dated this 29th day of August, 1946.

/s/ W. A. HANDY,

Attorney for Defendants.

[Endorsed]: Filed Sept. 13, 1946. [19]

[Title of District Court and Cause.]

JUDGMENT FOR PRELIMINARY
INJUNCTION

Plaintiff having filed his complaint and defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co., a partnership, having been served with the Complaint and Summons herein, an Order to Show Cause for Preliminary Injunction and Temporary Restraining Order and affidavits and a memorandum of points and authorities in support thereof, and having appeared by counsel, and a hearing on plaintiff's application for a preliminary injunction having been had on August 26, 1946 in the courtroom of the Honorable William C. Mathes, Judge of the above entitled court, in courtroom 2 of the United States Courthouse and Postoffice Building in the City of Los Angeles, County of Los Angeles, State of California, and Findings of Fact and Conclusions of Law having been filed, and sufficient reasons appearing therefor,

It is ordered, adjudged and decreed that a preliminary injunction issue against defendants Allen

Zeigler, Raymond Zeigler and West Coast Supply [20] Co., and each of them, their agents, servants, employees, attorneys and all persons in active concert or participation with said defendants and each of them, restraining and enjoining them, pending the hearing and determination of this action and until further order of the Court, from

1. Issuing any sugar ration bank checks in violation of Third Revised Ration Order No. 3, as amended;

2. Using or permitting the use of or otherwise disposing of any and all sugar now owned by or subject to the control of said defendants or any of them, except in such manner as shall be directed by order of the plaintiff, Administrator of the Office of Price Administration, or by his duly appointed agents on his behalf;

3. Violating any and all of the provisions of Third Revised Ration Order No. 3, as heretofore or hereafter amended.

Dated at Los Angeles, California, this 13th day of September, 1946.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Entered, docketed and filed Sept. 13, 1946. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL
INTERLOCUTORY ORDER

Notice is hereby given that Allen Ziegler, Raymond Ziegler, sued herein as Allen Zeigler and Raymond Zeigler, and the West Coast Supply Co., a partnership, appellants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order granting a preliminary injunction herein; the said order having been entered in this action on September 13, 1946.

LAZARUS AND HORGAN,
By PATRICK D. HORGAN,
Attorneys for Appellants.

(Affidavit of service by mail attached.)

[Endorsed]: Filed Oct. 10, 1946. [22]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

To Paul A. Porter, Administrator, Office of Price Administration, Plaintiff above named, Townson T. MacLaren and Eleanor Shur, his Attorneys.

You and each of you will please take notice:

That Allen Ziegler and Raymond Ziegler, Defendants, sued herein as Allen Zeigler and Ray-

mond Zeigler, and the West Coast Supply Co., a partnership, Defendant herein, having heretofore filed Notice of Appeal in the above entitled matter, and having in the Designation of Contents of Record on Appeal served herewith, not designated for inclusion for the Record on Appeal, the complete records and all the proceedings and evidence in the action, hereby serves upon you with said Designation of Contents [24] of Record on Appeal the following concise statement of points on which Appellants intend to rely on the Appeal:

I.

The Court erred in its conclusion of law and judgment that at all times pertinent herein, Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a), Title 3 of the Second War Powers Act, was and still is in effect.

II.

The Court erred in its conclusion of law that jurisdiction of the action and jurisdiction to issue the Preliminary Injunction lay within the Court, pursuant to the provisions of Section 2(a) 6 of the Second War Powers Act.

III.

The Complaint and the Affidavits on file herein in support thereof fail to state a claim against Appellants upon which relief by way of injunction can be granted.

Dated at Los Angeles, California, November 8, 1946.

LAZARUS AND HORGAN,
By /s/ PATRICK D. HORGAN,
Attorneys for Appellants and
Defendants. [25]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To Paul A. Porter, Administrator, Office of Price Administration, Plaintiff above named, Townson T. MacLaren and Eleanor Shur, his Attorneys.

You and each of you will please take notice:

That Allen Ziegler and Raymond Ziegler, Defendants, sued herein as Allen Zeigler and Raymond Zeigler, and the West Coast Supply Co., a partnership, Defendant herein, having heretofore filed Notice of Appeal in the above entitled matter, hereby designate the following portions of the record and proceedings to be contained in the record on appeal:

1. The Complaint filed herein on August 9, 1946.
2. The Order to Show Cause for Preliminary Injunction and Temporary Restraining Order filed herein on August 10, 1946.
3. The Affidavit of Edwin A. Poehlman in support of the Temporary Restraining Order and

Order to Show Cause for Preliminary Injunction, filed herein on August 10, 1946.

4. The Affidavit of Homer Lee Pruett, Jr., in support of Temporary Restraining Order and Order to Show Cause for Preliminary Injunction, filed herein on August 10, 1946.

5. Order to Show Cause for Preliminary Injunction and Temporary Restraining Order, filed August 26, 1946.

6. Interlocutory Findings of Facts and Conclusions of Law upon Application for Preliminary Injunction, filed herein September 13, 1946.

7. The Judgment for Preliminary Injunction made and entered herein on September 13, 1946, in Civil Order Book No. 39, Page 667.

8. Notice of Appeal.

9. Designation of Contents of Record on Appeal.

10. Statements of Points on which Appellants herein intend to rely upon Appeal.

Dated at Los Angeles, California, this 8th day of November, 1946.

LAZARUS AND HORGAN,

By /s/ PATRICK D. HORGAN,

Attorneys for Appellants and
Defendants.

[Endorsed]: Filed Nov. 8, 1946.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California,

County of Los Angeles—ss.

Dorothy Clasen, being first duly sworn, deposes and says:

That Affiant is a citizen of the United States and a resident of the County of Los Angeles; that she is over the age of eighteen years, and is not a party to the within and above entitled action; that Affiant's business address is 639 South Spring Street, Room 725, L. A. Stock Exchange Building, Los Angeles, California;

That on the 8th day of November, 1946, Affiant served Appellants' Designation of Contents of Record on Appeal [28] and Statement of Points on which Appellants intend to rely upon Appeal, filed herein on November 8, 1946, on the Plaintiff in said action, by leaving copies of the same with Towson MacLaron, attorney for plaintiff, at the Office of Price Administration, 1206 Sawtel Street, Los Angeles, California.

/s/ DOROTHY CLASEN.

Subscribed and sworn to before me this 8th day of November, 1946.

[Seal] /s/ JOHN K. FORD,

Notary Public in and for said
County and State.

[Endorsed]: Filed Nov. 8, 1946. [29]

[Title of District Court and Cause.]

AFFIDAVIT AND ORDER EXTENDING TIME
TO FILE RECORD AND DOCKET APPEAL

State of California,

County of Los Angeles—ss.

Patrick D. Horgan, being first duly sworn, deposes and says:

That he is an attorney with offices at 725 L. A. Stock Exchange Building, 639 South Spring Street, Los Angeles 14, California;

That he represents Allen Ziegler, Raymond Ziegler and the West Coast Supply Co., a partnership, Appellants and Defendants in the above entitled matter;

That on October 10, 1946, Affiant filed a Notice of Appeal from the Preliminary Injunction made and entered herein on September 13, 1946;

That on November 8, 1946, Affiant filed a Designation of Contents of Record on Appeal and a Statement of Points on Which Appellants Intend to Rely on Appeal, copies of which Affiant served on Plaintiffs on November 8, 1946;

That due to the press of business and particularly to the fact that Affiant has been engaged in dissolving a law partnership and that since on or about October 15, 1946, Affiant has had to attend alone to all of the partnership business then pending, Affiant has not had an opportunity to properly

attend to the prompt filing of the record and docketing of the appeal herein;

That the time for filing of the record and docketing of appeal herein will expire on November 19, 1946.

Affiant therefore respectfully requests that this Court enter an order extending the time for the filing of the record and the docketing of the appeal to and including December 2, 1946.

Dated this 11th day of November, 1946.

LAZARUS and HORGAN,
By /s/ PATRICK D. HORGAN.

Subscribed and sworn to before me this 11th day of November, 1946.

[Seal] /s/ JAMES K. FORD,
Notary Public in and for said
County and State.

It Is So Ordered, this 12th day of November, 1946.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed Nov. 12, 1946. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of

California, do hereby certify that the foregoing pages numbered from 1 to 31, inclusive, contain full, true and correct copies of Complaint for Injunction; Order to Show Cause for Preliminary Injunction and Temporary Restraining Order filed Aug. 10, 1946; Affidavits of Edwin A. Poehlman and Homer Lee Pruett, Jr., in Support of Temporary Restraining Order and Order to Show Cause for Preliminary Injunction; Order to Show Cause for Preliminary Injunction and Temporary Restraining Order filed Aug. 26, 1946; Interlocutory Findings of Fact and Conclusions of Law upon Application for Preliminary Injunction; Judgment for Preliminary Injunction; Notice of Appeal; Statement of Points on which Appellants Intend to Rely on Appeal; Designation of Contents of Record on Appeal; Affidavit of Service and Affidavit and Order Extending Time to File Record and Docket Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of November, A.D. 1946.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

[Endorsed]: No. 11491. United States Circuit Court of Appeals for the Ninth Circuit. Allen Ziegler, Raymond Ziegler and West Coast Supply Co., a partnership, Appellants, vs. Paul A. Porter, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 27, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 11491

J. H. ZEIGLER, ALLEN ZEIGLER, RAYMOND
ZEIGLER, PAUL ZEIGLER, JOHN DOE
and RICHARD ROE, Individually and as
partners doing business as West Coast Supply
Co., and WEST COAST SUPPLY CO., a
partnership,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price
Administration,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY UPON
APPEAL AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR CONSID-
ERATION OF APPEAL

Appellants, Allen Zeigler and Raymond Zeigler,
sued herein as Allen Zeigler and Raymond Zeigler
and the West Coast Supply Co., a partnership,
hereby refer to the Designation of Contents of
Record on Appeal and to the Statement of Points
on Which Appellants Intend to Rely Upon Appeal,
filed in the District Court of the United States for
the Southern District of California, Central Divi-
sion, on November 8th, 1946, and by this reference
formerly adopt such Designation of Record and

Statement of Points as their Designation of Record and Statement of Points on Which Appellants Intend to Rely Upon Appeal, required by Rule 19 (6) of the rules of the above entitled Court, to be filed with the Clerk of said Court.

Dated at Los Angeles, California, this 29th day of November, 1946.

LAZARUS and HORGAN,

By /s/ PATRICK D. HORGAN,

Attorneys for Appellants.

(Affidavit of Service attached.)

[Endorsed]: Filed Dec. 2, 1946.

No. 11491

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN ZIEGLER, RAYMOND ZIEGLER and WEST COAST
SUPPLY Co., a partnership,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price Ad-
ministration,

Appellee.

APPELLANTS' BRIEF.

LAZARUS AND HORGAN,

By PATRICK D. HORGAN,

639 South Spring Street, Los Angeles 14,

Attorneys for Appellants.

FILED

FEB 24 1947

PAUL P. O'BRIEN,

CLERK

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No. 11491
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN ZIEGLER, RAYMOND ZIEGLER and WEST COAST
SUPPLY Co., a partnership,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price Ad-
ministration,

Appellee.

APPELLANTS' BRIEF.

Jurisdiction.

This is an appeal from a temporary injunction issued by the District Court of the United States, Southern District of California, on September 13, 1946.

It was specifically found as a conclusion of law by the said District Court in its interlocutory findings of fact and conclusions of law upon application for preliminary injunction that jurisdiction to issue the preliminary injunction lay within said Court pursuant to the provisions of Section 2(a)-6 of the Second War Powers Act, as amended. (56 Stat. 176, 50 U. S. C. App. Sec. 633, *et seq.*) [Record p. 20.]

This Court of Appeals has jurisdiction upon appeal pursuant to the provisions of Section 129 of the Judicial Code, as amended (26 Stat. 828 (1891), 28 U. S. C. Sec. 227), to review the judgment for preliminary injunction in question.

Statement of Case.

A complaint for injunction was filed in the District Court of the United States, Southern District of California, on August 9, 1946, naming as defendants J. H. Ziegler, Allen Ziegler, Raymond Ziegler, and Paul Ziegler, John Doe and Richard Roe, individually and as partners doing business as the West Coast Supply Co., and the West Coast Supply Co., a partnership. [Record p. 2.]

The complaint alleged that defendants were engaged in the business of dealing with sugar and were subject as wholesalers to the provisions of Third Revised Ration Order No. 3. (11 Fed. Reg. 177.) [Record par. V, p. 3.]

It was further alleged that on July 1, 1946, defendants had a sugar ration balance to their credit in a Los Angeles bank of 23,196 pounds of sugar; that between July 1, 1946, and August 7, 1946, defendants drew, issued and used in payment for four checks totalling 1,370,000 pounds; that defendants' sugar ration bank account was overdrawn in the amount of 1,346,804 pounds. [Record par. VI, p. 4.]

It was alleged that defendants had title to and control of substantial amounts of sugar at their place of business and that 100,000 pounds of sugar were held subject to their control and at their order by a Los Angeles warehouse. [Record par. VIII, p. 4.]

It was thereupon alleged that defendants by overdraw-ing their sugar ration bank account and by accepting delivery and control of sugar obtained by invalid bank checks, violated the provisions of Third Revised Ration Order No. 3, as amended. [Record par. IX, pp. 4 and 5.]

In paragraph X of the complaint, it was alleged that unless defendants were restrained from issuing further ration bank checks and from overdrawing their ration bank account and from using the sugar then subject to their control, the general public would be deprived and denied their proper allotment of sugar available for public consumption. [Record p. 5.]

The affidavit of an O. P. A. sugar ration officer filed in support of the complaint stated that the officer's investigation showed that the West Coast Supply Co., a defendant, was a wholesaler within the meaning of Third Revised Ration Order No. 3, as amended, and as such maintained a sugar ration bank account in Los Angeles, which as of August 6, 1946, was overdrawn. Further, that the available supply of sugar was in short supply. [Record pp. 8 and 9.]

A further affidavit, that of an O. P. A. investigator, disclosed that certain amounts of sugar were delivered to Los Angeles warehouses for the benefit of the West Coast Supply Co., one of the defendants, on July 1, July 3, and July 29, 1946, and that as of August 9, 1946, 100,000 pounds of sugar were stored in a Los Angeles warehouse for the benefit of the West Coast Supply Co., one of the defendants. [Record pp. 11 and 12.]

Only the defendants Allen Ziegler, Raymond Ziegler and West Coast Supply Co., appellants herein, were served in the action in the District Court.

Upon an order to show cause for preliminary injunction, a hearing was held on August 26, 1946, before the Honorable William C. Mathes, Judge of the District Court of the United States, Southern District of California, and on the basis of his findings of fact and con-

clusions of law [Record pp. 17 to 22], filed September 13, 1946 [Record p. 22], a judgment for preliminary injunction was entered and docketed on September 13, 1946, in Civil Order Book 39, page 667 [Record p. 23] by the terms of which the District Court ordered, adjudged and decreed as follows:

"It is ordered, adjudged and decreed that a preliminary injunction issue against Defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co., and each of them, their agents, servants, employees, attorneys and all persons in active concert or participation with said Defendants and each of them, restraining and enjoining them, pending the hearing and determination of this action and until further order of the Court, from

1. Issuing any sugar ration bank checks in violation of Third Revised Ration Order No. 3, as amended;

2. Using or permitting the use of or otherwise disposing of any and all sugar now owned by or subject to the control of said Defendants or any of them, except in such manner as shall be directed by order of the Plaintiff, Administrator of the Office of Price Administration, or by his duly appointed agents on his behalf;

3. Violating any and all of the provisions of Third Revised Ration Order, as heretofore and hereafter amended."

The District Court also made certain findings of fact. [Record pp. 18 to 20.] Among such findings of fact were:

- "7. Unless restrained and enjoined, Defendants and each of them threaten to and will continue to

issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

"8. Unless restrained and enjoined, Defendants and each of them threaten to and will use and dispose of and put beyond their possession and control sugar obtained by means of invalid sugar ration bank checks.

"9. Unless Defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

"Unless Defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the Defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar." [Record pp. 19 and 20.]

The District Court also made the following conclusions of law among others:

"1. The action herein is brought pursuant to the provisions of Section 2(a)-6, Title 3, of the Second War Powers Act.

“2. Jurisdiction of this action and jurisdiction to issue the preliminary injunction herein lies within this Court, pursuant to the provisions of said Section 2(a)-6 of said Second War Powers Act.

“3. At all times pertinent hereto Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a), Title 3, of the Second War Powers Act, was and still is in effect.” [Record p. 20.]

It is to be noted that the judgment for preliminary injunction was based upon the complaint and affidavits in support thereof and upon the finding of facts and conclusions of law heretofore referred to. [Record p. 22.]

Within thirty days from the entry and docketing of the judgment, the defendants appealed by filing notice of appeal on October 10, 1946.

Specification of Errors.

The District Court erred:

1. In its conclusion of law and in adjudging that at all times pertinent herein Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a)-Title 3 of the Second War Powers Act, as amended, was and still is in effect.

2. In its conclusion of law that Allen Ziegler, Raymond Ziegler and West Coast Supply Co., and each of them, violated Sections 15.7(d) and 22.10 of Third Revised Ration Order No. 3, as amended.

3. In its findings of fact that unless restrained and enjoined defendants and each of them threaten to and will

continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

4. In its finding of fact that unless restrained and enjoined defendants and each of them threaten to and will use and dispose of and put beyond their possession and control sugar obtained by means of invalid sugar ration bank checks.

5. In its finding of fact that unless defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

6. In its finding of fact that unless defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar.

7. In issuing a temporary injunction where the complaint and affidavits in support thereof fail to state a claim by which relief by way of injunction could be granted.

Questions Involved.

The principal questions involved herein are:

1. Was there a reasonable relationship amounting to due process of law between sugar rationing and the exercise of the war powers of Congress as of July 1, 1946, and thereafter?

2. Were the standards fixed by the Second War Powers Act of 1942, as amended, as prerequisite to the lawful exercise of the rationing power constitutionally satisfied in the functions of Third Revised Ration Order No. 3 on July 1, 1946, and thereafter, that is:

(a) Was there a finding that sugar rationing was necessary "for fulfillment of requirements for the defense" of the United States as of July 1, 1946, and thereafter?

3. Could Third Revised Ration Order No. 3 be valid where there was in fact no showing of a sugar shortage in the United States as of July 1, 1946, and thereafter?

4. Were the provisions of Third Revised Ration Order No. 3 relating to the historical base for sugar allocations to industrial users including appellants, in such conflict with provisions of the War Mobilization and Reconversion Act as to render the provisions of Third Revised Ration Order No. 3 invalid as of July 1, 1946, and thereafter?

5. Were the provisions of Third Revised Ration Order No. 3 suspended from July 1, 1946, to July 25, 1946, during the suspension of the operation of the Emergency Price Control Act of 1942, as amended?

6. Was the injunction properly issued where there was no showing by plaintiff of impending or threatening acts on the part of defendants?

SUMMARY OF ARGUMENT.

A. The Provisions of Third Revised Ration Order No. 3, as Amended, Were Unconstitutional as of July, 1946, and Thereafter.

The provisions of Third Revised Ration Order No. 3, as amended, are predicated upon the authority of Section 2(a) of Title III of the Second War Powers Act, as amended. It is settled law that the latter Act may be constitutionally valid only in so far as it is a proper exercise of the war powers of Congress. It is likewise settled that in order for the said Act to be a proper exercise of war powers, there must be a reasonable relationship between such powers and the time of defendants' alleged act and the rationing of the particular commodity, sugar. Inasmuch as at the time of the defendants' alleged acts on July 1, 1946, and thereafter, the fighting part of World War II was over and since at such time there was no showing of need for nor in fact was there any need for allocation of any commodities for the *defense* of the United States, there was no basis for the exercise of war powers per the instrument of sugar rationing as of that time and thereafter, and hence the provisions of Third Revised Ration Order No. 3, as amended, were as of July 1, 1946, and thereafter, unconstitutional in that such provisions violated the Fifth Amendment of the Constitution of the United States.

B. The District Court Erred in Finding That as of July, 1946, and Thereafter, Third Revised Ration Order No. 3 Was in Effect.

I. The said order was invalid as of the stated times because the order fixed a historical base for the allocation of sugar to the defendants as industrial users and the fixing of such a base was in conflict of Section 203 of the War Mobilization and Reconversion Act of 1944, providing that production of materials should not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time.

II. The said order was invalid as of the said times because in the year 1946, as apparent from public reports, from the U. S. Department of Agriculture, U. S. Department of Commerce, and of Trade Journals reports, there was no sugar shortage in the United States.

III. Inasmuch as Third Revised Rational Order No. 3, as amended, was issued by the Office of Price Administration pursuant to the authority of the Second War Powers Act of 1942, as qualified by the Emergency Price Control Act of 1942, as amended, and since the Emergency Price Control Act was suspended during the period of July 1, 1946, to July 25, 1946, the provisions of Third Revised Ration Order No. 3 were likewise suspended during that time—time within which all of appellants' alleged acts may have taken place.

C. The District Court Erred in Granting the Preliminary Injunction in the Absence of the Showing of Impending or Threatening Action on the Part of the Defendants.

Preliminary injunctions have always been denied in the absence of impending or threatening action on the part of the defendants. The function of the process of injunction is to provide against future wrongs rather than to punish for past offenses. Defendants' acts herein were closely spaced during a period when there was doubt as to the continued existence of rationing and such actions were discontinued following the revival of the new Office of Price Administration. No previous or subsequent violations were asserted. Except for conclusions of fact therefore, there was no showing of impending or threatening actions on the part of defendants, and hence, the preliminary injunction should have been denied.

ARGUMENT.

Introductory Statement.

This case brings before the Court of Appeals some new questions, some old ones.

The new questions are of particular importance because they challenge the constitutionality of rationing regulations as applied to an economy which is not at war and not at peace. They specifically challenge the constitutionality of the regulations by the test tube of the due process requirements of the Fifth Amendment to the Constitution of the United States.

The appellants are in the position of a typical small business attempting to gain a foothold in the peacetime economy which is emerging from the nearly defunct economy of war. Whether sugar rationing was reasonably related to the war powers of Congress as of July 1, 1946,—whether Third Revised Ration Order No. 3, as amended, could on any theory be valid in the light of its historical base for sugar allocation—in direct conflict with provisions of the War Mobilization and Reconversion Act of 1944—whether sugar rationing can be valid if there is no showing of a sugar shortage—where on the contrary public records and reports indicate no shortage whatever—these are questions affecting not only the appellants, but all private business in the United States in these times.

The broader issues—as to how long under the guise of war powers, the Government can imprison private business within the trackless maze of administrative regula-

tions; as to whether Government can feed its chosen foreign policies through the instrument of sugar rationing, are issues implicit in the determination of this case.

It is respectfully submitted that the constitutional validity of Third Revised Ration Order No. 3, as amended, upon which the temporary injunction issued in this case depends, should be determined in the setting of the economic facts of American life as those facts existed on July 1, 1946, and thereafter—not in the setting of the shooting war of December, 1941 to August, 1945.

As for the old questions—they are ones which concern appellants alone.

It is the position of appellants that the District Court had before it no facts, assuming as we must that the allegations of the complaint were true and of the affidavits in support thereof, to warrant the said Court to issue a temporary injunction, for there was no showing of impending or threatened acts on the part of the defendants. And this as the cited decisions indicate has historically been a strict requirement for the issuance of a temporary injunction.

In this connection, it may also be noted that the amount of sugar herein involved has no relevance whatever to the questions whether impending or threatening acts were shown.

A. The Provisions of Third Revised Ration Order No. 3, as Amended, Were Void and of No Effect at the Time of Defendant's Alleged Acts and Thereafter.

I. There Was No Reasonable Relationship Between the Exercise of War Power and the Rationing of Sugar as of the Time of Defendants' Alleged Acts and Thereafter.

The constitutional validity of the sugar rationing program and specifically of Third Revised Ration Order No. 3, issued by the Office of Price Administration must be sustained if at all on the basis of the exercise of the war powers of Congress through the delegation of rationing power to the President under the Second War Powers Act. Unless so justified the said ration order must be invalid in violation of due process within the meaning of the Fifth Amendment of the Constitution of the United States.

See:

O'Neal v. U. S., 140 F. (2d) 908 (6 Cir. 1944):
Sec. 2(a)-6 of Title III, Second War Powers Act,
as amended, 56 Stat. 176, 50 U. S. C. App.,
Sec. 631, *et seq.*;

Third Revised Ration Order No. 3, 11 Fed. Reg.
134 *et seq.*;

U. S. Const., Art 1, Sec. 8.

Assuming that the sugar rationing program was created and administered through the war powers of Congress, there must be a reasonable relationship between the rationing of sugar and the exercise of such war powers

at the time defendants' acts took place and thereafter to satisfy the due process requirement of the Fifth Amendment of the Constitution.

It is axiomatic that in the exercise of all of the powers granted to it under the Constitution, Congress must find a reasonable relationship between the particular power and the acts done under the authority of such power.

So at various times the Supreme Court of the United States has found that Congress attempted to exercise a power in a manner not reasonably related to the nature of the power.¹

The Supreme Court has also held that a regulation may be created under a state of facts wherein Congress may have a reasonable basis for exercise of a power, but that later through a change in facts, the exercise of the power may no longer be reasonable, and hence, the regulation originally valid becomes unconstitutional.

In *Chastleton Corp., et al. v. Sinclair, et al.*, 264 U. S. 543 (1924), Justice Holmes found that a Rent Act enacted in the District of Columbia in 1921 and later extended in 1922, might, although originally valid, because

¹See:

Railroad Retirement Board, et al. v. Alton R. R., 295 U. S. 330 (1935), in which the Railroad Retirement Act of June 27, 1934, was held unconstitutional in that various sections of the Act were not reasonable exercise of the power of Congress to regulate interstate commerce;

U. S. v. Butler, et al., 297 U. S. 1 (1936). The Agricultural Adjustment Act of May 12, 1933, was declared unconstitutional as an unreasonable exercise of the tax powers of Congress.

of the war emergency, become invalid because of a change in housing conditions. Justice Holmes said at page 547:

“ . . . a law depending upon the existence of an emergency, or other state of facts to uphold it, may cease to operate after the emergency ceases, or the facts change, even though valid when passed.” (Citing cases.)

See also:

Perrin v. U. S., 232 U. S. 478 (1914);

Newton v. Consolidated Gas Co., 258 U. S. 165 (1922);

George B. Newton Coal Co. v. Davis, 281 Penn. St. Rep. 74 (1924), 126 Atl. 192.

During the fighting part of the recent war, the courts may well have taken judicial notice that all food commodities were in short supply, and that rationing, *per se*, of any food was authorized under the war powers of Congress, as delegated under the Second War Powers Act. Drastic administrative control was obviously necessary “in the public interest and to promote the national defense.”

J. P. Steuart & Bro. v. Bowles, 332 U. S. 398, 64 S. C. 1097 (1944);

Henderson v. Bryan (D. C. Cal., 1942), 46 Fed. Supp. 682.

As of July 1, 1946, and thereafter, the time of defendants' alleged acts, the fighting war had been over for nearly a year. The demobilization process was well under way. It is a matter of common knowledge that the need for food commodities such as sugar was only a frac-

tional part of the requirements for such commodity during the fighting part of the war and the immediate months following the surrender of our enemies. By July, 1946, many executive war agencies in the office of the President similar to the Office of Price Administration had been terminated by the President in recognition of the fact that such agencies were no longer useful for war purposes.²

The duration of war powers themselves is indefinite and fixes no clear standard. Following the First World War, there were three separate periods when the war allegedly ended, so that even now it is not possible to know when, for constitutional purposes, the war powers of Congress came to an end during the First World War.

See:

Hudson, *The Duration of The War Between the United States and Germany*, 39 Harvard Law Rev., 1020 at 1045 (1926).

²Among the agencies terminated were:

Office of War Information, terminated Sept. 15, 1945 (Executive Order 9608, Aug. 31, 1945, 10 Fed. Reg. 11223).

War Refugee Board, terminated Sept. 14, 1945 (Executive Order 9614, Sept. 14, 1945, 10 Fed. Reg. 11789).

Office of Strategic Services and the Inter-intelligence Service, terminated Dec. 31, 1945 (Executive Order 9621, Sept. 21, 1945, 10 Fed. Reg. 12033).

Office of Fishery Coordination, terminated Oct. 30, 1945 (Executive Order 9649, Oct. 30, 1945, 10 Fed. Reg. 13431).

Office of Censorship, terminated Nov. 15, 1945 (Executive Order 9631, Sept. 28, 1945, 10 Fed. Reg. 12304).

War Relocation Authority, terminated June 30, 1946 (Executive Order 9742, June 30, 1946, 11 Fed. Reg. 7125).

Office of Civilian Defense, terminated June 5, 1945 (Executive Order 9562, June 5, 1945, 10 Fed. Reg. 6639).

It has often been expressed according to an old fiction of international law, that the war powers last until treaties of peace are concluded.³

Since treaties have not been concluded as yet following World War II and there is no immediate prospect of their being concluded, it is obvious that we cannot justify the continued exercise of sugar rationing on the theory that it may last as long as the war, that is, until treaties are concluded. If this were so, there would be no meaning to the limitations placed in the Second War Powers Act, or of the Constitutional requirement of due process of the Fifth Amendment, that in the exercise of the war powers, as in all its powers, there must be a reasonable relationship between the exercise of such powers and rationing of a particular commodity.

It is submitted that in the instant case the Court erred in failing to examine the changed conditions of the war status of the United States, as of July 1, 1946, and thereafter in issuing the temporary injunction in this case. Further, that the changed conditions in the war economy in the United States following the surrender of our enemies cut off the reasonable relationship between the war powers and sugar rationing on which Third Revised Order No. 3 was based, at least as of July 1, 1946, and thereafter.

Chastleton Corp., et al, v. Sinclair, et al, 264 U. S. 543;

Newton v. Consolidated Gas, 258 U. S. 165;

Perrin v. U. S., 232 U. S. 478.

³ *Ware v. Hylton*, 3 Dall. 198, at 236 (1796);
Hijo v. U. S., 194 U. S. 315 (1904).

II. Tested by the Legislative Standard Fixed by the Second War Powers Act as a Prerequisite to Presidential Exercise of the Power to Ration, Third Revised Ration Order No. 3 Was Invalid as of the Time of Defendants' Alleged Acts and Thereafter.

In the delegation to the President of its power to ration, Congress prescribed a specific condition as a prerequisite to the exercise of rationing by the President. The Second War Powers Act provides in part,

“Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material, or of any facilities for defense . . . the President may allocate”

Ch. 199, Title III, Sec. 301(2);

56 Stat. 177;

50 U. S. Code, Sec. 333, sub-sec. 2(a)(2).

The President then has no power to ration unless he finds that the fulfillment of the requirements for the defense of the United States will result in a shortage.

See:

O'Neal v. U. S., 140 F. (2d) 908, Cir. 1944.

There were no facts before the District Court, either as alleged in the complaint or in the affidavits in support thereof that as of the time of defendants' alleged acts on July 1, 1946, and thereafter, there were in fact any requirements for sugar to be used “for the defense” of the United States.

Third Revised Ration Order No. 3, as amended, nowhere makes reference to any requirements for sugar for the defense of the United States. In Executive Order 9745 of June 30, 1946 (11 Fed. Reg. 7327), in which he

purports to continue the functions among others of the O.P.A. which had been delegated to that agency by the Second War Powers Act, as amended, the President makes no reference to the fulfillment of requirements for the defense of the United States.

Similarly, the Act extending the Second War Powers Act, as amended, to March 30, 1947, is silent to this point.

Act of June 29, 1946, Chap. 526, Sec. 1;

60 Stat. Sec. 345;

50 U. S. C. App. 645.

It is submitted that in view of the war status of the nation as of July 1, 1946, nearly a year after the actual cessation of hostilities, there could be no possible finding by the President nor by any administrative agency, that the fulfillment of requirements for the *defense* of the United States required sugar rationing.

It is submitted that the term "defense" as used in the Second War Powers Act, *supra*, is limited by the general concept of war powers under which the act found its constitutional validity and hence meant defense in the sense of defense against enemies.

The existence of a national economic emergency following the war or of a sugar shortage is not alone sufficient for the exercise of rationing powers as war powers.

Ex parte Milligan, 4 Wall, 2 (1866);

Panama Refining Co. et al, v. Ryan, 293 U. S. 388 (1935);

Home Building & Loan v. Blaisdell, et al, 290 U. S. 398 (1934);

U. S. v. L. Cohen Grocery Company, 255 U. S. 81 (1921).

And when a war power statute limits the delegation of such powers to a specific condition as did the Second War Powers Act, as amended, and further when there can be no showing that such condition or finding can be satisfied, the statute then becomes invalid as lacking in due process within the meaning of the Fifth Amendment of the Constitution.

Appellants herein against whom the preliminary injunction below was issued, were deprived of the use of and the right to the disposition of their property, sugar [Record, p. 23], and since the said injunction was based on an invalid ration order appellants were deprived of their property without due process of law.

B. The Provisions of Third Revised Ration Order No. 3, Were Invalid and Were Not in Effect as of July 1, 1946, and Thereafter.

I. Third Revised Ration Order No. 3 Was Itself Invalid as of July 1, 1946, and Thereafter, Because of Conflict With Provisions of the War Mobilization and Reconversion Act.

Although the Record does not disclose the fact that appellees herein were industrial users of sugar, the complaint refers to appellees herein as wholesalers within the meaning of Third Revised Ration Order No. 3. [Record, p. 3.]

From the provisions of Third Revised Ration Order No. 3, it is clear that as "wholesalers," appellants were subject as industrial users to the provisions of Third Revised Ration Order No. 3.

The District Court in its findings of fact stated that defendants were subject to the provisions of Third Re-

vised Ration Order No. 3 [Record, p. 18] and on the basis of a finding that defendants had violated certain provisions of Third Revised Ration Order No. 3, the District Court issued a temporary injunction in this case. [Record, pp. 22 and 23.]

It was decreed that the preliminary injunction *inter alia*, that the defendants were restrained and enjoined from "violating any and all of the provisions of Third Revised Ration Order No. 3 as heretofore and hereafter amended." [Record, p. 23.]

Third Revised Ration Order No. 3, provides, among other things that the base period use or base for allocations of sugar to industrial users shall be determined by the amount of sugar used in certain periods during the year 1941.

Third Revised Ration Order No. 3, Sec. 2.1(e),
11 Fed. Reg. 137.

If the industrial user did not use sugar during each month in 1941 such user was permitted to have his base for allocation determined by sugar used at his establishment from January 1, 1941, to April 27, 1942. (Third Revised Ration Order No. 3, Sec. 2.1(2), 11 Fed. Reg. 137.)

Unless an industrial user qualified according to the regulations for the base period of 1941 or in the alternative for the period January 1, 1941 to April 27, 1942, such users as of July 1, 1946 and thereafter could not obtain sugar as industrial users in the same quantities as those qualifying under the base period.

These provisions of Third Revised Ration Order No. 3 which affected defendants as industrial users were in

direct conflict with Section 203 of the War Mobilization and Reconversion Act of October 3, 1944, Chap. 480, Title III, 58 Stat. 787, which provides in part as follows:

“ . . . the executive agencies exercising control over manpower, production, or materials shall permit the expansion, resumption, or initiation of production for nonwar use whenever such production does not require materials, components, facilities or labor needed for war purposes, or will not otherwise adversely affect or interfere with the production for war purposes. Such production for nonwar use shall be permitted regardless of whether one or more competitors normally engaged in the same type of production are still engaged in the performance under any contract which is needed for the prosecution of the war, and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time; . . . ”

By the War Mobilization and Reconversion Act Congress stated its legislative policy that as to the production of materials of any kind for nonwar use discrimination should not be made against a concern on the basis of its failure to be in business at any particular time. By its very terms the above provision of Third Revised Ration Order No. 3 in fixing a sugar base for industrial users on the basis of their 1941 output violated the said provisions of the War Mobilization and Reconversion Act and hence such provisions of the Third Revised Ration Order No. 3 by which these defendants were affected were invalid. Hence the temporary injunction based upon an alleged violation of sections of Third Revised Ration

Order No. 3 by an industrial user or wholesaler, was itself invalid.

Moberly Milk Products Co. v. Fleming, D. C., D. C., 15 U. S. Law Week 2419 (affd. U. S. Ct. App., D. C., 2-14-47).

In the *Moberly* case, an injunction against enforcement of the provisions of Third Revised Ration Order No. 3 was issued on behalf of the plaintiff Milk Products Company on the ground that the historical base for sugar allocation in the said ration order was in conflict with the provisions of the War Mobilization and Reconversion Act of 1944, cited above. Justice Letts stated:

“The Congress saw fit to encourage small enterprises and new plants and to protect same in the expansion and initiation of products for non-war use. To further such Congressional purpose statutory safeguards were set up to protect small plants and new concerns from discriminatory use of historical use bases for any purposes in ration orders.”

Moberly Milk Products Company v. Fleming, D. D., D. C., 15 U. S. Law Week, 2419 (affd. U. S. Ct. App. D. C., Feb. 14, 1947).

II. Third Revised Ration Order No. 3 Was Invalid as of July 1, 1946, and Thereafter, Because There Was No Sugar Shortage in the United States at Such Time.

Aside from the legislative standard that there must be a finding by the President that the fulfillment of the requirements of the United States will result in a shortage of a particular commodity during a period in order that rationing may be in valid exercise of war powers, there is the self evident broader proposition that if no sugar

shortage in the United States in fact existed as of July 1, 1946 and thereafter, there could be no reasonable basis of the exercise of the rationing power and hence the provision of Third Revised Ration Order No. 3 were applicable and not in effect at such time.

See:

Panama Refining Co. v. Ryan, supra;

O'Neal v. U. S., supra;

Chastleton v. Sinclair Oil Co., supra.

From public reports, specifically reports of the U. S. Department of Agriculture and U. S. Department of Commerce and from Trade Journals, it is apparent that there was no shortage of sugar in the United States as of July 1, 1946, and thereafter; on the contrary, it is apparent from such public reports on the available sugar supply during the year 1946 and from public reports on the estimated United States consumption of sugar by civilian and military use that a sufficient sugar supply existed in the United States during the year 1946 to meet the normal sugar needs of the entire population of the United States and that unless United States controlled Cuban sugar had been allocated to foreign countries in 1946, sufficient sugar to fill the needs of the entire population would have been available for disposal to the people of the United States.

TABLE NO. 1

Available Supply of Sugar for Consumption in United States, 1946.

	Short Tons		Pounds	
	Raw	Total Refined	Per Capita Raw ⁵	Refined
Requirements*	7,173,860	6,708,115	103.2**	96.5 ⁶
Actual Consumption	5,645,913	5,276,554 ⁷	81.2	75.9
Deficit	1,527,947	1,431,561	22.0	20.6
U. S. Controlled Cuban sugar allocated to other countries	1,619,000 ⁸	1,513,084	23.3	21.8
If added to actual consumption	5,645,913	5,276,554	81.2	75.9
1946 U. S. Exports	7,264,913	6,789,638	104.5	97.7
1935-39 U. S. Exports	405,000 ⁹ 92,489 ¹⁰	378,505 86,438		
Excess over Pre-war	312,511	292,067	4.5	4.2
If added to U. S. Consumption and U. S. controlled Cuban sugar	7,264,913	6,789,638	104.5	97.7
	7,577,424	7,081,705	109.0	101.9

*Based on 1935-39 average per capita consumption of 96.5 pounds of refined sugar for a population of 139,028,300.¹¹

**Converted on basis of 1.07 pounds of raw sugar equals one pound refined sugar.

Source of Data:

⁵Basis for Conversion from refined to raw in 1945 Agricultural Statistics, Bureau of Agricultural Economics, U. S. D. A., p. 93.

⁶The National Food Situation, Bureau of Agricultural Economics, U. S. D. A., Sept. 1946, p. 7.

⁷Weekly Statistical Sugar Trade Journal (Willett and Gray, 140 Front St., New York 5), Jan. 23, 1947, p. 37.

⁸Industry Report Sugar, Molasses and Confectionery, Office of Domestic Commerce, Fats, Foods and Oils Section, Bureau of Foreign and Domestic Commerce, U. S. Department of Commerce, Dec. 1946, p. 6.

⁹Same as ⁸ above. Aug. 1946, p. 15.

¹⁰Same as ⁷ above, p. 39.

¹¹Calculated by dividing U. S. Dept. of Agriculture estimated 1946 per capital consumption 72.6 pounds (same source as 5 above) into 5,400,000 tons, the estimated consumption for 1946 (same as ⁹ above, p. 18).

TABLE NO. 2.

Sugar, raw value equivalent: Estimated United consumption by civilians, and use by military and war services (units of 1,000 tons)

Calendar Year	Type of Use		Total
	Civilian	Other	
1935	6,602	139	6,741
1936	6,703	80	6,783
1937	6,642	93	6,735
1938	6,645	83	6,728
1939	6,908	150	7,058
1940	6,763	195	6,958
1941	7,350	189	7,539
1942	6,102	663	6,765
1943	5,569	1,226	6,795
1944	6,158	1,355	7,513
1945	5,092	1,053	6,045
1946 ¹²	5,400	165	5,565

¹²Preliminary estimate.

Source of Data:

1935-44, Agricultural Outlook Charges, 1946, Bureau of Agricultural Economics, U. S. D. A., Dec. 1945, p. 110.

1945-46, "Industry Report Sugar, Molasses and Confectionery," Prepared by George F. Dudik, Office of Domestic Commerce, Foods, Fats and Oils Section, December 1946, U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Washington 25, D. C., p. 18.

Congress had no power to delegate authority to the President under the Second War Powers Act or otherwise to distribute American sugar to foreign countries in furtherance of the war powers of Congress.

Compare:

U. S. v. L. Cohen Grocery Company, supra.

On the contrary, the rationing authority is limited by the Second War Powers Act to needs for the "defense of the United States."

In view of the fact that public reports demonstrate that there was sufficient sugar in the United States during the year 1946 for the needs of the whole population, there was no basis for the exercise of the rationing power at least as of July 1, 1946, and thereafter, and hence the provisions of Third Revised Ration Order No. 3 were invalid as of such times.

III. The Provisions of Third Revised Rational Order No. 3 Were Invalid at the Time of Defendants' Alleged Violations in That Saving Provisions Under the Emergency Price Control Act of 1942, as Amended, as to Acts Done Between July 1, 1946 and July 25, 1946 Apply to Third Revised Ration Order No. 3.

The District Court found as a Conclusion of Law that the provisions of Third Revised Ration Order No. 3 were in force and effect as of the time of the alleged acts of the appellants complained of. [Record, p. 20.]

The specific dates on which appellants' acts in violation of the said order occurred are not set forth in the complaint, nor on the verified affidavits filed in support thereof [Record, pp. 2-6, 8-13]; nor do such dates appear at any place in the Record.

The complaint and affidavits generally state that between July 11, 1946, and August 7, 1946, appellants did draw and issue and use in payment for sugar certain ration checks. [Record, p. 4.] There are no allegations as to exactly when appellants drew such checks.

It is a matter of law and of judicial knowledge that between July 1, 1946, and July 25, 1946, the Emergency Price Control Act of 1942 and the Regulations promulgated thereunder were no longer in force and effect. The Emergency Price Control Act of 1942 expired by its own terms on June 30, 1946. The President vetoed the first new price bill and did not sign the present one extending the Emergency Price Control Act of 1942 until July 25, 1946.

The position of appellants is that the Office of Price Administration issued Third Revised Ration Order No. 3 under authority of the Second War Powers Act as limited by the Emergency Price Control Act; that in view of the provisions of the Emergency Price Control Act hereinafter cited, the rationing authority of the OPA was subject to the same suspension or hiatus period between July 1 and July 25, 1946, as was price control, or as was any other administrative function of the Office of Price Administration.

If this is so, the failure of appellees to allege in the complaint, or to state in the affidavits attached thereto, any fact showing any acts in violation of Third Revised Ration Order No. 3 by these appellants, after July 25, 1946, and before July 1, 1946, failed to state a claim upon which injunctive relief could be granted.

The power to ration was allegedly delegated by Congress to the President by the Act of June 28, 1940, Ch. 440, 54 Stat. 676, 50 U. S. C. App. 1152(a)(2) which provided in part:

“Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

material or of any facilities for the defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.”

The only power of Congress to enact such legislation must have been derived from the war powers of Congress.

O’Neal v. U. S. (C. C. A., Tenn., 1944), 140 F. (2d) 908, Cert. Den. 64 S. Ct. 945;

Perkins v. Brown (D. C., Ga., 1943), 53 Fed. Supp. 176;

U. S. v. Beit Bros. (D. C., Conn., 1943), 50 Fed. Supp. 590;

Henderson v. Bryan (D. C., Cal., 1942), 46 Fed. Supp. 682.

By Executive Orders, the President created the Office of Price Administration as a sub-agency of the War Production Board, and had conferred on the Office of Price Administration the administration of rationing before the creation of the Office of Price Administration under the Emergency Price Control Act of 1942.

O’Neal v. U. S., *supra*.

But Congress, in whom the rationing power was originally vested an exercise of war power, and who had originally doled out that function, among others, to the President through the Act of June 28, 1940, then gave legislative birth to the Office of Price Administration by the Emergency Price Control Act of 1942.

Act of Jan. 30, 1942, C. 26, 56 Stat. 23; 50 U. S. C. App. 901, *et seq.*

This Act provided in part as follows:

“There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator . . .” (50 U. S. C. App. 921(a).)

The Act further provided:

“. . . The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the government with respect to any particular commodity or commodities . . .” (50 U. S. C. App. Sec. 921(b).)

The previous exercise of the rationing function by the OPA was thus merged with the price functions authorized by the Emergency Price Control Act of 1942. From thenceforth, the OPA administered rationing under specific Congressional authorization.

O’Neal v. U. S., supra.

Shortly after the enactment of the Emergency Price Control Act of 1942, Congress revised the Act of June 28, 1940, carrying over the rationing provision previously set out, in what was known as the Second War Powers Act.

Act of March 27, 1942, T III, Sec. 301, 56 Stat. 177; 50 U. S. C. App. 633, Sec. 2(a)(2).

This Act added nothing to nor subtracted nothing from the rationing provisions of the Act of June 28, 1940, and the Emergency Price Control Act of 1942.

Through subsequent changes, the rationing clause in Section 921(b) of the Emergency Price Control Act, remained.

In accordance with the provisions of Section 901 of the same Act, however, all of the regulations, orders, price schedules and requirements thereunder, expired on June 30, 1946.

Hence, Congress expressed its intent to include the rationing authority of the OPA to be suspended, along with the rest of the authority of OPA, from July 1, to July 25, 1946; and that period of refuge is as available to appellants in this case to the same extent as if this were a price control case.

It is settled that during the period from July 1, 1946, to July 25, 1946, neither civil nor criminal violations of the Emergency Price Control Act of 1942, as amended, were possible.

U. S. v. Auerbach (D. C., S. D., Cal., 1947), 68 Fed. Supp. 776.

See, also:

Porter v. Shibe, 158 F. (2d) 68.

C. The District Court Erred in Issuing the Temporary Injunction Because There Was No Showing of Impending or Threatened Acts on the Part of the Defendants.

The issuance of a temporary injunction is a drastic remedy and should not be exercised by the court unless the right to relief is clear.

Milliken v. Stone, 16 F. (2d) 981 (2d Cir., 1927).

In keeping with this principle, the courts have required a showing that action by defendants sought to be enjoined is impending or threatened before they will grant injunctive relief. The showing in the complaint must be real and definite.

Alexander v. DeWitt (C. C. A. 9, 1944), 141 F. (2d) 573, 577;

U. S. v. William S. Gray Co., 59 F. Supp. 665 (D. C., S. D., N. Y., 1945);

S. E. C. v. Electric Bond & Share Co., 18 F. Supp. 131, 148 (D. C., N. Y., 1937);

Bowles v. Shellhamer, et al., 61 Fed. Supp. 465 (D. C., Dela. 1945).

The complaint for injunction alleges that between July 11, 1946, and August 7, 1946, the defendants did draw and issue and use in payment for sugar, four checks totaling 1,370,000 pounds. Further, that the defendants did not make deposits in their ration bank account to cover such checks, and that the sugar ration bank account of defendants, was as of the date of the complaint, overdrawn in the amount of 1,346,804 pounds. [Record, p. 4.] There is the further allegation that unless the defendants are restrained from issuing further sugar ra-

tion banking checks that the general public would be denied its right to the proper allotment and portion of sugar available for public consumption. [Record, p. 5.]

In support of the above allegations there is no showing in the affidavits in support of the temporary restraining order and order to show cause for a preliminary injunction that the defendants or any of them threatened to continue drawing and issuing sugar checks. There is merely the allegation that unless defendants are restrained that the rationing program for sugar would be imperiled. [Record, p. 10.]

In the order to show cause, however, the court stated:

“ . . . and it further appearing that violations are likely to occur . . . ” [Record, p. 14.]

There are wholly gratuitous statements in the Court's interlocutory findings of fact to the effect that unless restrained and enjoined the defendants would continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks. [Record, p. 19.]

The Court may take judicial notice of the fact that during the larger part of the period when defendants' acts are alleged to have taken place, that is, between July 11, 1946, and August 7, 1946, the Emergency Price Control Act was not in effect; it had lapsed on June 30, 1946, and was revived on July 25, 1946.

There is no clear showing in the complaint, nor in the affidavits attached thereto, as to exactly on what days or dates the defendants' acts took place and it may be assumed for the purpose of this discussion that all defendants' acts took place within the period in July, 1946, in which the OPA was temporarily not in existence. To put it obliquely, there is no showing in the complaint nor in the affidavits, that defendants committed any act whatever before July 1, 1946, nor after July 25, 1946.

If then there is to be any finding that the defendants were likely to issue further checks against their ration bank account for which there was no sufficient balance, such finding must be based on the acts done during the period when the Emergency Price Control Act was not in existence and when price, rent and other controls were suspended.

In spite of the volume of sugar involved in this case, there can, it is submitted, be no reasonable inference from the facts alleged in the complaint, and supported by the affidavits attached hereto, that defendants would continue issuing invalid sugar ration bank checks. On the contrary, the inference would appear to be that the defendants, during a period when the Emergency Price Control Act was no longer in existence, during a period when controls generally were in a state of hiatus, obtained certain amounts of sugar through invalid ration checks, and confined their activities to that period of hiatus, neither before nor afterwards issuing any invalid sugar ration checks.

The courts have always held that not only must injunctive relief be denied unless there is an eminent threat, but the eminence of the defendants' threatened acts must be alleged with specificity.

New Jersey v. Sargent, 269 U. S. 328, 338-339 (1926);

N. Y. v. Ill., 274 U. S. 488, 489 (1927);

Conn v. Mass., 282 U. S. 660, 674 (1931);

Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 285 (1909);

Hogeman Farms Corp. v. Baldwin, 293 U. S. 163, 170 (1934);

Cruikshank v. Bidwell, 176 U. S. 73, 81 (1900);

E. I. Dupont de Nemours & Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2, 1936);

Universal Rim Co. v. G. M. C., 31 F. (2d) 969, 970 (C. C. A. 6, 1929);

U. S. v. Hart-Carter Co., 63 Fed. Supp. 982;

High, Injunctions (4th Ed. 1905), Sec. 34.

There has been no allegation of facts in the complaint, nor do the affidavits indicate any facts which show that defendants threatened, after the particular acts complained of during the stated period of July 11, to August 6, 1946, to continue drawing invalid sugar ration checks. On the contrary there are merely conclusions set forth in the findings of fact that defendants threatened to continue issuing such invalid ration bank checks. [Record, p. 19.]

The rules relating to the granting of injunctive relief have been followed in cases arising out of the rationing and price control programs, and the courts have uniformly

held that where there is no showing of threat or intent by defendants to operate in the future in violation of the price regulations an injunction must be denied.

Bowles v. Minish (D. C., Ala., 1944), 56 Fed. Supp. 153;

Bowles v. Jones & Laughlin Steel Corp. (D. C., Ala., 1944), 54 Fed. Supp. 1006;

Bowles v. Rugg (D. C., Ohio, 1944), 57 Fed. Supp. 116;

Bowles v. Arlington Furniture Co. (C. C. A. 7, 1945), 148 F. (2d) 467;

Bowles v. Huff (C. C. A., Cal. 1944), 146 F. (2d) 428.

Conclusion.

It is respectfully submitted that the District Court erred in its findings of fact and conclusions of law as stated in the within Specification of Errors; that as of July 1, 1946, and thereafter, the provisions of Third Revised Ration Order No. 3, as amended, were invalid and were unconstitutional in violation of the Fifth Amendment to the Constitution of the United States; further, that as there was no showing of impending or threatening acts on the part of defendants, the temporary injunction should not have issued.

Wherefore, appellants respectfully pray that the temporary injunction be dissolved and set aside.

Respectfully submitted,

LAZARUS AND HORGAN,

By PATRICK D. HORGAN,

Attorneys for Appellants.

APPENDIX.

SECOND WAR POWERS ACT OF 1942, AS AMENDED.

Section 2(a)(2) of the Second War Powers Act of 1942, as amended (Act of March 27, 1942, Chap. 199, Title III, Sec. 301, 56 Stat. 177), provides as follows:

“(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

“(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled ‘An Act to promote the defense of the United States’ (Title 22, §411 *et seq.*);

“(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

“(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. *Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a short-*

age in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. (Emphasis added.)

Section 2(a)(6) of the same Statute provides in part as follows:

“(6) The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Phillippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder heretofore or hereafter issued”

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.

Section 104 of the Emergency Price Control Act of 1942, as amended, June 30, 1944, Chap. 325, Title I, 58 Stat. 637, 50 U. S. Appendix 921, provides in part as follows:

“(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the “Administrator”). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of

\$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended (Title 5, §§661-673, 674). The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local or other agencies, and utilize and establish such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency."

Section B of the same Statute provides as follows:

"(b) The principal office of the Administrator shall be in the district of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. *The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; . . .*" (Emphasis added.)

THIRD REVISED RATION ORDER NO. 3, AS AMENDED.

Third Revised Ration Order No. 3, as amended, 11 Fed. Reg. 134 through 165, provides in part as follows:

Section 15.7(d) (page 153):

“(d) Overdrafts prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account.”

Section 22.10 provides as follows (page 164):

“Unlawful use or possession. No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this order.”

Article II—Industrial Users, provides in part as follows (page 137):

“Section 2.1(e). Industrial users were required to report their use of sugar during certain quarterly periods—(Base-period use or Base). (1) As a part of his re-registration, an industrial user whose industrial user establishment is already registered under Rationing Order No. 3 was required to report, on Schedule II of OPA Form R-1200, the total number of pounds of sugar of which he made an industrial use (other than those for which he was entitled to receive a provisional allowance) at his industrial user establishment during 1941. The

report showed the amount he used during each of the following quarters in 1941:

First quarter, January to March, inclusive.

Second quarter, April to June, inclusive.

Third quarter, July to September, inclusive.

Fourth quarter, October to December, inclusive.

(2) If his industrial user establishment did not use sugar during each month in 1941, the industrial user was permitted to divide the total amount used at his industrial user establishment from January 1, 1941 to April 27, 1942, inclusive, by the number of months in which he was in operation during that period. In making that computation, the industrial user treated as a full month any calendar month in which he was in operation at least sixteen days. Any month in which he was in operation for less than sixteen days was treated for this purpose as a fraction of a month. This figure was multiplied by three and the result was treated as the amount used during each quarter. (For example, if the industrial user first used sugar on November 17, 1941, he was deemed to have been in business for $5-14/30$ months; accordingly, if he used 1,000 pounds of sugar from November 17, 1941 to April 27, 1942, inclusive, his sugar use would be, for each month in his base period, 1,000 divided by $5-14/30$, or 183 pounds, and for each quarter 183 times 3 or 549 pounds.)

Section 2.2. Industrial user allotments—(a) General. To enable an industrial user to get and use sugar at his industrial user establishment, he is given an allotment for each use or product for which he has established a base-period use in accordance with this order. Allotments

are given for fixed periods called allotment periods. The allotment periods are the following quarterly periods:

- (1) First quarter: January to March, inclusive;
- (2) Second quarter: April to June, inclusive;
- (3) Third quarter: July to September, inclusive;
- (4) Fourth quarter: October to December, inclusive.

(b) Application for allotments. Application for any allotments must be made, in person or by mail, to the District Office with which his establishment is registered on OPA Form R-1230. The application must be made not more than fifteen days before, nor more than five days after, the beginning of the period. However, the District Office may permit an application to be made at any time before an allotment period under such circumstances as the Washington Office of the Office of Price Administration may direct. The District Office, in its discretion, may also permit an application to be made at any time within the allotment period, but if it is made more than five days after the beginning of the period, the industrial user's allotment shall be reduced by an amount which bears the same proportion to the allotment as the number of days which have lapsed from the start of the period bears to the total number of days in the period.

(c) Amount of allotment. The amount of an allotment of an industrial user is determined on the basis of his use of sugar at his industrial user establishment during the quarter in the base period corresponding to the allotment period. The amount of sugar used by him during the

quarter for which he has established a base period use is multiplied by the percentage or percentages fixed in the supplement to this order for that use or class of products and the numbers which result are added, and the total is his allotment, stated in pounds, for that use or class.

Sec. 2.3. Increases in allotments based on increases in population—(a) The amount of increases. An industrial user who in 1941 delivered to an area listed in the supplement to this order products for which he may obtain an allotment may, for each allotment period, obtain an increase in the allotment he is entitled to get under Section 2.2. The amount of the increase is determined as follows:

- (1) Determine the amount of sugar which he used in products he delivered in 1941 to the listed area.
- (2) Determine the amount of sugar which he used in all products he delivered in 1941.
- (3) Divide the number obtained in (1) by the number obtained in (2).
- (4) Multiply the number obtained in (3) by the percentage shown for that area for such allotment period in section 4.1 of Supplement No. 1. (The result is the percentage by which the industrial user's allotment is increased.)
- (5) If he made deliveries to more than one listed area, add together the percentage increases in allotment for all such areas. (This is the total percentage by which his allotment is increased.)

- (6) Multiply the total percentage increase (the figures obtained in (4), if he made deliveries to one listed area, or (5), if he made deliveries to more than one listed area) by the industrial user's allotment as determined under section 2.2 for the allotment period for each use or class of product. (This is the amount of the increase in allotment to which the industrial user is entitled, under this section, for that allotment period.)"

No. 11,491

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY Co. (a partnership),
Appellants,

VS.

PHILIP B. FLEMING, Temporary Controls
Administrator,
Appellee.

**Appeal from the District Court of the United States for the
Southern District of California, Central Division.**

BRIEF FOR APPELLEE.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
Chief, Appellate Branch

ROSE MARY W. FILIPOWICZ,
Attorney

Office of Price Administration
Office of Temporary Controls
Washington 25, D. C.

WILLIAM B. WETHERALL,
Regional Litigation Attorney
San Francisco 4, California

WADIEH SHIBLEY,
Attorney-in-Charge
Los Angeles, California

FILED

MAY 4-1947

PAUL P. O'BRIEN,

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No. 11,491

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY Co. (a partnership),
Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,
Appellee.

Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal from a judgment for preliminary injunction issued by the United States District Court for the Southern District of California, pursuant to Section 2(a)(6) of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C. App. Secs. 631-645(a)). Jurisdiction of this Court is invoked under Section 129 of the Judicial Code. (28 U.S.C. Sec. 227.)

ARGUMENT.

I.

SUGAR RATIONING CONTINUES TO BE A VALID EXERCISE OF THE WAR POWERS OF CONGRESS.

Appellants attack the constitutional validity of sugar rationing on the ground that "changed conditions of the war status of the United States as of July 1, 1946 and thereafter," and the "changed conditions in the war economy of the United States following the surrender of the enemies," cut off the "reasonable relationship between the war powers and sugar rationing on which Third Revised Ration Order #3 was based". (App. Br., p. 18.) This contention is supported only by their statement that "as of July 1, 1946, and thereafter, * * * It is a matter of common knowledge that the need for food commodities such as sugar was only a fractional part of the requirements for such commodity during the fighting part of the war and the immediate months following the surrender of our enemies". (App. Br., p. 17.)

Appellants admit that before the capitulation of our enemies, rationing *per se* was a valid exercise of the war power of Congress. They do not deny that the war emergency continues, *Porter v. Shibe*, 158 F. (2d) 68 (C.C.A. 10, 1946); *Porter v. Granite State Packing Co.*, 155 F. (2d) 786 (C.C.A. 1, 1946); *Bowles v. Barde Steel Co.*, 164 P. (2d) 692 (Ore., 1945); *Bowles v. Soverinsky*, 65 F. Supp. 808 (D.C. E.D., Mich., 1946); *Bowles v. Ormesher Bros.*, 65 F. Supp. 791 (D. Neb., 1946); *Bowles v. Lee*, 4 OPA Opinions & Decisions 2095 (S.D. Ill., N.D., not of-

ficially reported); nor do they take open issue with the well-established principle that the war powers of Congress extend beyond the period of active warfare and terminate only with the ratification of a treaty or a proclamation of peace. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 S. Ct. 106; *Hijo v. United States*, 194 U.S. 315, 24 S. Ct. 727; *The Protector*, 12 Wall. 700; *Stewart v. Kahn*, 11 Wall. 493; *United States v. Anderson*, 9 Wall. 56.

Their argument appears to be based, however, on the reasoning that with the cessation of hostilities, Congress' power to ration food was transferred out of the class of war powers justified by the mere existence of a legal state of war and placed in the category of those that must be dependent on the existence of a necessity arising out of the war or incident thereto.

In answer, it is submitted that even if it were assumed that the power to ration sugar must now be justified by the existence of such a necessity incident to the war, its exercise is nevertheless still valid, for " * * * the war power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress * * * ." *Stewart v. Kahn*, *supra*.

The cessation of hostilities brought to a close but one phase of the war. The period of reconstruction had just begun. Of that Congress was well aware when

it reenacted the Second War Powers 'Act'¹ in December, 1945,² four months after the surrender of Japan. Report No. 1282 (to accompany H.R. 4780, 79th Cong., 1st Sess., Nov. 26, 1945) explained:

“* * * the Axis Powers have been brought to unconditional surrender, yet neither the war nor the peace has been won. Our victory then is neither final nor complete. We still have before us and our allies years of service in foreign lands, requiring the solution of problems at least as difficult as were those of war.” (p. 1.)

The importance of food in winning the peace was emphasized by Congress in these words:

“The conflagration that so recently blanketed the globe, still flares in spots. We have learned that no place is too remote to be a menace. * * * *Military and naval might, * * * do not quench the fire of war so potently as the milk of human kindness. No civilized nation, much less one that is Christian, can allow even surrendered enemies to starve or freeze when we have enough and to spare. That would not even be good business, were we so base as to be governed by no higher motive.* Even more incumbent on us is it to share with our allies in the liberated countries; and, of course, we must not fail to provide adequately for our own forces of occupation. This job cannot be done until the last man or woman so engaged shall have been brought safely home and be happily rehabilitated into our peacetime economy.” (p. 2.) (Emphasis added.)

¹56 Stat. 176, 50 U.S.C. App., Secs. 631-645(a).

²Public Law 270, 79th Cong., 1st. Sess.

Only by continued rationing of our critical supplies would we have been able to allocate food to those in need during this period. How strongly the world food shortage motivated Congress to extend the Second War Powers Act again in June, 1946,³ is apparent in its reports. Senate Report No. 1414, dated June 4, 1946 (79th Cong., 2d Sess., to accompany H.R. 5716) stated:

“A complete hearing on this bill was held on May 31 * * *.” (p. 1.)

“All of the testimony clearly supported assertions of the need for continuation of the seven titles with which this bill deals. Stress was laid on the fact that in addition to other reasons for continuing the authority granted by these titles, *several new factors have arisen which are also impelling reasons for such continuance, including the present tragic food shortage throughout the world*, the housing situation in the United States, and unsettled labor and industrial conditions recently arisen and now threatened.” (p. 2.) (Emphasis added.)

House Report No. 1714, dated March 14, 1946 (79th Cong., 2d Sess., to accompany H.R. 5716) referring to its Report No. 1282 of November 26, 1945, *supra*, said:

“These same impelling reasons * * * will serve the same purposes as were then apparent, with three exceptions: (1) *the world food shortage * * * [has] become more apparent * * **.” (p. 1.) (Emphasis added.)

³Public Law 475, 79th Cong., 2d Sess.

On March 31, 1947, Congress again extended Title III of the Second War Powers Act by the Sugar Control Extension Act of 1947. Both Senate and House Reports⁴ dwelled at length on the necessity for continued sugar control. Concerning the shortage of sugar, H.R. 150 stated:

“Devastation during the war in important sugar-producing areas has resulted in a short world supply of sugar. The low point in sugar production was reached in 1945-1946 with a world production of 26,692,000 tons which amounted to only 77 percent of the pre-war 1935-1939 average production of 34,660,000 tons. [Short tons, raw value] Estimated production in 1946-47 showed an important recovery to 30,361,000 tons or 88 percent of the prewar average.”

After discussing past production, current demands, allocations and supplies, also future prospects of sugar production, the report concluded:

“The committee feels that it would be unwise at this time to terminate the authority to exercise rationing and price control over sugar. It feels that if such controls were terminated at this time, it might result in excessive price increases and the further probability that the housewife would be at a disadvantage of having to bid against the industrial user for the available short supply. Therefore, it recommends that the authority be continued to October 31, 1947, with

⁴H.R. 150 to accompany H.J.Res. 146, dated Mar. 15, 1947, 80th Cong., 1st Sess., S.R. 50 to accompany S.J.Res. 58, dated Mar. 12, 1947, 80th Cong., 1st Sess.

the right to exercise inventory controls until March 31, 1948 * * *.”

Such Congressional determinations of the necessity for legislation, must be given great weight. When a similar argument as is here tendered was urged in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *supra*—that in October, 1919 there was no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, under the War-Time Prohibition Act—the Supreme Court said:

“* * * on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued.”

Obviously, appellants here do not present such a “clear case” to offset the Congressional determination of the notorious fact that there is a world shortage of food, particularly sugar; that in order to meet its commitments to our allies and the peoples in the occupied and liberated countries, and to protect the domestic consumer from the economic confusion which would result from uncontrolled competition; Congress must exercise its war power to effectively allocate the short supplies of sugar.

II.

- A. THE FACTS WHICH INDUCED THE PRESIDENT TO EXERCISE THE POWER TO RATION WERE NOT REQUIRED TO BE PROVED BELOW.
- B. THE WORDS "DEFENSE OF THE UNITED STATES" AS USED IN SECTION 2(a)(2) OF THE SECOND WAR POWERS ACT DO NOT REFER ONLY TO DEFENSE AGAINST THE ENEMY.

Objection is made by the appellants that no facts were present before the District Court to show that as of the time of the defendants' violative acts "there were in fact any requirements for sugar to be used 'for the defense of the United States'," as set forth in Section 2(a)(2) of Title III of the Second War Powers Act. (App. Br., p. 19.)

The pertinent part of Section 2(a)(2) read:

"* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The facts which induced the President to exercise the power granted by this section were not required to be proved below. The law presumes that the decision by the President to act pursuant to that grant was preceded by adequate investigation and rooted in sufficient grounds. This principle is of long standing.

In 1827, the Supreme Court declared in *Martin v. Mott*, 12 Wheat. 19:

“The argument is that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore, it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the Court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. *Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, a fortiori, this presumption ought to be favorably applied to the chief magistrate of the Union.* It is not necessary to aver, that the act which he may rightfully do, was so done.” (Emphasis added.)

This presumption has been applied in other cases and in a great variety of circumstances. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet. 448, 458; *Rankin v. Hoyt*, 4 How. 327, 335; *Carpenter v. Rannels*, 19 Wall. 138, 146; *The Confiscation Cases*, 20 Wall. 92, 109; *Knox County v. Ninth National Bank*, 147 U.S. 91, 97; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 182, 184, 39 S. Ct. 507; *United States v. Chemical Foundation*, 272 U.S. 1, 14, 15,

47 S. Ct. 1, and reiterated in *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 56 S. Ct. 163, where Justice Brandeis stated:

“The question of law may, of course, always be raised whether the Legislature had the power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446, and *A. L. A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.”

Such a presumption can be challenged only if there should be no conceivable connection between the Congressional grant and the act performed under the delegated power. *Sterling v. Constantin*, 287 U. S. 378, 399, 400, 401. In this case, no challenge was made below by the appellants. Their argument here is based merely on their allegation that neither the President nor any administrative agency could possibly have made the finding that there were requirements for sugar to be used for the defense of the United States nearly a year after the cessation of active hostilities, because the term “defense” as used in Section 2(a)(2) of the Second War Powers Act “meant defense in the sense of defense against enemies”. (App. Br., p. 20.)

No proof is offered to show that the word “defense” as used in the Act encompassed any other purpose

than that of vanquishing our enemies, nor do the appellants present any backing to their implication that with the end of active hostilities any rational nexus between the power granted the President and its exercise to allocate sugar, disappeared.

However, one need not go far to refute their statement. In House Report No. 1282, *supra*, Congress clearly expressed its intent that the term "defense" be not so narrowly limited. On page 4 appears the following explanation:

"This title establishes the powers under which the War Production Board-Civilian Production Administration, Office of Price Administration, Department of Agriculture, Office of Defense Transportation, Solid Fuels Administration, and certain other agencies have allocated and rationed materials and facilities. The powers were used up to the capitulation of Japan for a two-fold purpose—to assure simultaneously the production of a maximum quantity of war materials in a minimum of time, and of materials necessary to support the basic civilian economy. *Since that date there has been a change of emphasis in the exercise of these powers by the departments in the belief that Congress intended the defense program to include an orderly reconversion to a peacetime economy. During the next few months there will necessarily be a further change of emphasis in the exercise of these powers, with an increasing use for reconversion purposes as distinguished from the military purposes. While both priorities and allocations will be granted where necessary to assure support of our Army and Navy, the primary task will be the liquidation*

of our war effort and the hastening of reconversion and restoring the flow of materials to peacetime channels.” (Emphasis added.)

It is noteworthy that each time Title III of the Second War Powers Act was subsequently extended, including the Sugar Control Extension Act of 1947, the words “for the defense of the United States” were advisedly retained therein by Congress. As expressed above, the defense of the United States will not be complete until an orderly reconversion to a peacetime economy is completed.

III.

APPELLANTS' CONTENTION THAT THERE WAS NO SUGAR SHORTAGE IN THE UNITED STATES AS OF JULY 1, 1946, AND THEREAFTER, IS TOTALLY WITHOUT MERIT.

Claiming that no sugar shortage existed in the United States as of July 1, 1946, or thereafter, appellants challenge the Third Revised Ration Order No. 3 as an unreasonable exercise of the rationing power. To support this contention, they offer statistics which appear on the face, to indicate that there was sufficient sugar available in the United States in 1946 to satisfy the requirements of the country for that year. (App. Br., p. 26.)

A summary glance over the figures, however, immediately reveals that their conclusion is based on a false premise—that the Cuban sugar allocated to other countries and the sugar exported in 1946 was

sugar taken from the United States supply and distributed to other countries. That was not the fact.

Appellants' chart shows that the difference between the 1946 requirements for sugar and the actual amount allocated for consumption in the United States for that year was 1,527,947 short tons, raw value. This difference between the demand and the supply of sugar in the United States during 1946 represents the actual shortage existent at that time.

There was no other sugar available to the United States that year. The Cuban sugar allocated to other countries is not "American sugar" as urged by the appellants. In purchasing the entire 1946 Cuban sugar crop, the United States bought it not only for itself, but on behalf of other nations. This clearly appears in the same report⁵ from which the appellants took their figures concerning the "American sugar" which they claim was distributed to other foreign countries. Page 6 of the report states:

"From 1946 production, Cuba reserved 398,000 tons for Island use and set aside 284,000 tons for free export, chiefly to Latin America. The remainder of the crop was sold to the United States, *which purchased both for itself and on behalf of other nations*. About 2,175,000 tons of 1946 Cuban output were scheduled for United States use. The remainder of the contract for the 1946 crop, including more than 1,600,000 tons, was

⁵Industry Report on Sugar, Molasses and Confectionery, Office of Domestic Commerce; Fats, Foods and Oils Section; Bureau of Foreign and Domestic Commerce, United States Department of Commerce, Dec., 1946.

allocated to the United Kingdom, Canada, and a number of sugar-short countries of continental Europe.” (Emphasis added.)

Since 1942, the United States has acted as agent to buy the Cuban export supply for distribution among the importing countries, in accordance with the recommendations of the International Emergency Food Council.⁶ The reason for the United States handling the sale of this Cuban sugar was explained as follows by James H. Marshall, Director, Sugar Branch, Production and Marketing Administration, United States Department of Agriculture:

“In acting essentially as the sole purchaser of Cuban sugar, the United States has had to share some of the supply with other allied nations. This procedure has eliminated speculative bidding by the nations of the world and has also given Cuba an assured price without the inflationary and deflationary headaches which she suffered in 1919 and 1920. The first page of the 1946-47 Cuban sugar contract recognizes that one of the prime reasons for such a contract is that, ‘al-

⁶“The International Emergency Food Council has no mandatory powers. It seeks to coordinate proposed distribution of exportable food supplies which are in short supply so that they may be used as effectively as possible in meeting pressing world food needs. Its recommendations are only effective upon acceptance by the member governments. The 30 nations which now comprise membership in the Council are as follows: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, India, Italy, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of the Philippines, Siam, Sweden, Switzerland, Turkey, Union of South Africa, United Kingdom, and the United States”—House Report No. 150 to accompany H.J.Res. 146, 80th Cong., 1st Sess., dated March 15, 1947.

though hostilities have terminated, the effects of the war make it necessary during the reconversion period, because of the needs of the United States and other allied nations to undertake the supplying of sugar and other products through governmental agencies or organizations of an international character.'

Thus, there is an obligation on the part of the United States—acting as sole purchaser of nearly all of Cuba's sugar—to share a substantial part of this sugar, through sale to other nations. It is also an historical fact that many nations in addition to the United States purchased Cuban sugar in prewar years. It is reasonable to assume that Cuba is as anxious as any other nation to maintain her postwar trade with other countries of the world.'''

In 1946, the Cuban sugar production totalled 4,476,000 tons. After allowances for Cuban local consumption and free export to other Latin American nations, Cuba had an exportable balance of 3,794,000 tons. Of that crop, the United States received for its own use 2,175,000 tons, which left a balance of 1,619,000 tons for Canada, the United Kingdom and other foreign countries.⁸ Of this amount, 148,000 tons was UNRRA sugar. About one-fourth of the 1,619,000 tons sent to foreign nations has been refined in the United States.

⁷Remarks before the annual convention of the American Bottlers of Carbonated Beverages, Miami, November 21, 1946.

⁸Industry Report on Sugar, Molasses and Confectionery, *supra*, p. 6.

This is the sugar that appellants have erroneously assumed was exported by the United States.⁹

It is often overlooked that in the true sense, the United States does not export sugar. We are a net importing nation of sugar and have been one for many years.¹⁰ The Industry Report on sugar, molasses and confectionery, *supra*, page 10, on which appellants relied for their figures concerning Cuban sugar, shows clearly that of our 1946 supply of sugar, only about one-third was from domestic production and the balance had to be imported.

The exports shown in appellants' statistics are actually exports of Cuban sugar allocated to other countries, which was brought into the United States for the purpose of refining for the countries which have no facilities for the refining process. Thus, the figure of 312,511 tons which represented the difference between the 1946 and the 1935-39 "exports" was also erroneously designated as sugar which was removed from the 1946 available supply of sugar for the United States.

The sugar shortage in the United States in 1946, as at present, is so well-known as to be the proper subject of judicial notice. No juggling of figures can ob-

⁹Remarks of James H. Marshall, Director, Sugar Branch, Production and Marketing Administration, United States Department of Agriculture, before the annual convention of the American Bottlers of Carbonated Beverages, Miami, November 21, 1946.

¹⁰See also, Message of the President of the United States transmitting request for the Extension of the Second War Powers Act after March 31, 1947, February 3, 1947. Document No. 80, 80th Cong., 1st Sess.

literate the cold fact that the devastation of war in important sugar producing areas resulted in a short world supply of sugar, from which the United States is not exempt.

In October, 1946, the United States Department of Agriculture issued this explanation:

“WHY SUGAR IS SHORT

Here are the major reasons why people in the United States aren't able to have approximately the 100 pounds of sugar per capita they want annually instead of the 73 pounds they're getting.

1. Present continental U. S. beet and cane sugar production is about 30 percent of the 1946 estimated distribution. This percentage was about the same in prewar years. During the war years, the pressures for other food crops brought about a substantial decline in domestic beet sugar production. This decline has now been checked, and substantial increases over the lowest production year are noted.

2. When the Japanese captured the Philippines, the U. S. lost about 1,000,000 tons of sugar which it annually imported from those Islands. War damage was so extensive that there will be no appreciable exports from the Philippines before 1948.

3. Jap occupation of Java eliminated about 1,250,000 tons of sugar which normally went to countries friendly to the United States. This placed an additional 'squeeze' on world supplies. Java will probably not produce again for export before 1948.

4. Nearly all European countries produced substantial amounts of beet sugar in prewar years, but this industry was badly torn apart by war and Nazi occupation. European beet sugar production is making a steady though gradual comeback.

5. Many factors, including usable land areas, make it impracticable to increase substantially the cane sugar production in Louisiana, Florida, Puerto Rico, Hawaii, or the Virgin Islands.

6. Cuba—and to a lesser extent, other Caribbean areas, became the ‘world sugar bowl.’ Although Cuba increased production substantially, she could not offset losses suffered in all other parts of the world.

Only in 1943 could Cuba have produced a little more sugar, but at that time submarine sinkings were so bad and shipping was so restricted that additional sugar could not have been moved from Cuba even if produced—and Cuba used all possible storage space. Some sugar was, in effect, ‘stored in the field’ by letting substantial acreages of cane grow for 2 years instead of 1. Two-year cane produces more sugar than 1-year cane—but not as much as two crops of 1-year cane.

As a war measure, the equivalent of about 900,000 tons of the ’44 crop Cuban sugar was diverted to manufacturing industrial alcohol required for making synthetic rubber.

In 1945 Cuba suffered the worst drought in 87 years, with a consequent loss of about 900,000 tons of sugar production.

7. All these (and others) factors have aggravated the shortage. U. S. citizens would have

had a little bit more sugar if this nation had flatly refused to share any supplies with our allies, or had refused to extend a minimum of aid to liberated areas."

The importance of rationing sugar in the United States was stressed by the President in his Message to Congress on February 3, 1947, concerning the extension of the Second War Powers Act after March 31, 1947, when he stated:

"Because of our heavy dependence on imports, the world shortage of sugar and related products is of outstanding concern to the United States. Total sugar available for shipment to the United States, Canada, and all western European countries in 1947 is expected to be only about 7½ million tons, compared with average net imports before the war of about 8½ million and 1946 imports of 6¾ million * * *

In this situation, both our domestic and international interests require continuation of domestic and import controls over sugar and edible molasses and syrups and import controls only over other sugar-containing products and inedible molasses.

Domestically, unless current controls are continued, there would be inequitable distribution of the limited supply among various users; much sugar would be held for speculative purposes, and it is probable that sugar would go to a greater extent to industrial users, resulting in a lower proportion for household consumers than they now receive * * *

Internationally, decontrol would make it extremely difficult for us to carry out the understanding under which the United States, since 1942, has acted as agent to buy the Cuban export supply for distribution among the importing countries in accordance with the recommendations of the International Emergency Food Council
* * *

In the face of such well known facts, appellants' argument that there was no sugar shortage in the United States loses all vestige of merit.

IV.

APPELLANTS CANNOT PROPERLY RAISE THE QUESTION OF THE CONFLICT OF THE HISTORICAL USE METHOD OF ALLOCATING SUGAR TO INDUSTRIAL USERS WITH THE PROVISIONS OF THE WAR MOBILIZATION AND RECONVERSION ACT.

Appellants admit that the record discloses only that they were wholesalers and contains no indication that they were industrial users at the time of the proceedings below. Nevertheless, they aver that as "wholesalers" they were subject to the provisions of the Third Revised Ration Order No. 3 as "industrial users." They then attack the validity of the Third Revised Ration Order No. 3 on the ground that the historical use method of allocating sugar to industrial users conflicts with the provisions of the War Mobilization and Reconversion Act. (App. Br., p. 21.)

Appellee submits that appellants' argument falls for these reasons:

a. Appellants' status in the action below was that of a wholesaler and not an industrial user. (See Complaint, R. 3; Affidavit in support of Temporary Restraining Order, R. 9; Ration Bank Statement, R. 13; Findings of Fact, R. 18, where the Court found that the allowable inventory of the Company was 36,627 pounds.)¹¹ There is nothing to indicate that the appellants were industrial users. Nor does the record contain a showing of any relationship whatsoever between the violation charged below and the amount of sugar which would have been allowable to the appellants, assuming that they were industrial users and what adverse effect, if any, the historical use method of sugar allocation would have had on their business.

Third Revised Ration Order No. 3¹² clearly shows that wholesalers and industrial users are considered as separate and distinct classes and are subject to different provisions therein.

Section 25.1(c)(3) defines "industrial user" as "any 'person' who has an industrial user establishment. 'Industrial user establishment' means any establishment where a person uses sugar in producing, manufacturing, or processing any product other than sugar if the product is not to be used in the preparation or service of food or beverages which the establishment or its owner serves to consumers

¹¹Section 4.3 of the Order provides for a working inventory of sugar for each registered wholesaler. This is known as an "allowable inventory." No other class of users is given this type of allowance.

¹²11 F.R. 177.

* * * An industrial user who ceases (other than temporarily) to make an industrial use of sugar is not regarded as an industrial user after he ceases."

Section 25.1(c)(29) defines "wholesaler" as "an establishment which makes over 50 percent of its sales of all merchandise to persons other than consumers. The term 'wholesaler' does not include a primary distributor."

Article II, Sections 2.1 to 2.14 contain provisions for registration, allotments, ration banking, etc. of industrial users while rules for the registration, allowable inventories, ration banking, etc. of wholesalers are contained in Article IV, Sections 4.1 to 4.9. There is nothing in the entire regulation which applies to one class of users the provisions exclusively applicable to another. Thus, appellants erroneously stated in their brief that as wholesalers they "were subject as industrial users to the provisions of Third Revised Ration Order No. 3."

b. The decision in *Moberly Milk Products Co. v. Fleming* (App. D. C., Feb. 14, 1947, not yet reported; Petition for Writ of Certiorari pending), on which the appellants rely in their argument was limited only to the effect of Amendment 24 of Third Revised Ration Order No. 3 on the bulk sweetened condensed milk manufacturers. It did not include the effect of Section 2.1(2) on the industrial users generally. Moreover, the Court's holding there did not invalidate Third Revised Ration Order No. 3. On the contrary, the Court took pains to point that out as follows:

“We note at this point that the injunction order of the District Court is not a sweeping invalidation of rationing or allotments. It is couched in the language of the statute. It enjoins appellants only from carrying out such provisions as make the quota dependent upon the existence of any concern or the functioning of any concern in the bulk sweetened condensed milk manufacturing industry at any given time, or contain restrictions which prevent any small plant, capable and desirous of participating in the expansion, resumption, or initiation of production of bulk sweetened condensed milk from so participating in such production. Those are the terms of the prohibition of the statute. The injunction of the court merely places upon the injunction of the Congress the enforcing power of the judiciary. It directs the Administrator not to do what Congress directed him not to do.”

c. Furthermore, any question of conflict of the provisions of Section 2.1(e) and 2.1(2) of the Third Revised Ration Order No. 3 with the War Mobilization and Reconversion Act has been rendered moot by the following provision of the Sugar Control Extension Act of 1947 (Public Law 30, 80th Congress, 1st Session):

“Sec. 1(b). The Secretary of Agriculture, in exercising the powers, functions, and duties transferred to him by section 3 of this Act (1) may allocate sugar without regard to the provisions of Title II of the War Mobilization and Reconversion Act of 1944 (58 Stat. 787); * * *.”

It is well-settled that if after judgment and before the decision of the Appellate Court a law intervenes and changes the governing rule, the Appellate Court will give such law effect. *United States v. The Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49; *Carpenter v. Wabash Railway Co.*, 60 S. Ct. 416, 309 U. S. 23, rehearing denied 60 S. Ct. 585; *Vanderbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 61 S. Ct. 347; *Hines v. Davidowitz*, 312 U. S. 52, 61 S. Ct. 399; *Public Utilities Comm. of Ohio v. United Fuel Gas Co.*, 63 S. Ct. 369, 317 U. S. 456, rehearing denied 63 S. Ct. 557; *Ziffrin, Inc. v. United States*, 63 S. Ct. 465, 318 U. S. 73, rehearing denied 63 S. Ct. 757, 318 U. S. 800; *Standard Oil Company v. Angle*, 128 F. (2d) 725 (C. C. A. 5th, 1942).

The principle has also been applied by this Court in *Home Savings & Loan Association v. Plass*, 57 F. (2d) 117, where it was held that where during appeal Congress passed an act excluding building and loan associations from the operation of the Bankruptcy Act, an appeal from the dismissal of appellant's petition below, had to be dismissed because of lack of jurisdiction.

Therefore, even if the issue of conflict with the War Mobilization and War Reconversion Act were properly present here, the application of the above-quoted provision in the Sugar Extension Act of 1947 by the Court would dispose of the question.

V.

**VIOLATIONS OF THE SECOND WAR POWERS ACT WERE NOT
AFFECTED BY THE SUSPENSION OF THE OPERATION OF
THE EMERGENCY PRICE CONTROL ACT OF 1942, FROM
JULY 1 TO 25, 1946.**

It is urged that the "period of refuge" during which price control was suspended, July 1 to July 25, 1946, should be made "available to appellants in this case to the same extent as if this were a price control case." (App. Br., p. 32.)

Needless to say, the contention is incongruous. The action below was brought under the authority of the Second War Powers Act for a violation of Third Revised Ration Order No. 3 promulgated thereunder. The functions of the Second War Powers Act, as amended,¹³ and of the Emergency Price Control Act of 1942, as amended,¹⁴ are entirely separate and distinct. Any violations, therefore, of the Second War Powers Act and regulations issued thereunder during the period the appellants depend upon were, of course, not affected by the suspension of the Emergency Price Control Act.

The hiatus period, July 1 to July 25, 1946, when the operation of the Emergency Price Control Act was deferred, did not affect the functions, powers and duties of the Office of Price Administration and the Price Administrator with respect to allocation and rationing, which were vested in the President by Title

¹³56 Stat. 176, 50 U.S.C. App. Secs. 631-645(a).

¹⁴56 Stat. 23, 50 U.S.C. App. Secs. 901-946.

III of the Second War Powers Act and delegated thereunder to the Office of Price Administration and the Price Administrator.

Moreover, even though the Emergency Price Control Act was not extended until July 25, 1946, all the functions of the Office of Price Administration with respect to the Emergency Price Control Act of 1942, did not terminate on June 30, 1946. Certain provisions of the Act remained in force during the hiatus period. Section 1(b) of the Emergency Price Control Act provided:

“The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on *June 30, 1946*, * * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.”

This was affirmed by the President in Executive Order 9745 (11 F.R. 7327), dated June 30, 1946, in which the Office of Price Administration and the Price Administrator were directed to continue to exercise their continuing functions under the Emergency Price Control Act as well as the Second War Powers Act.

VI.

**THE DISTRICT COURT DID NOT ERR IN ISSUING THE
TEMPORARY INJUNCTION.**

Appellants urge that in issuing the temporary injunction, the Court erred on two grounds: (1) that there were no allegations of facts in the Administrator's complaint or affidavit to show that defendants threatened to continue drawing invalid ration bank checks; and (2) that the Court's findings of fact that defendants threatened to continue issuing such invalid bank checks, were "merely conclusions" without sufficient basis in fact. (App. Br., p. 36.) Neither argument is tenable.

1. It is well-settled that in an application for a statutory injunction, no showing of irreparable injury need be made. The right of the United States or any agency thereof to obtain an injunction provided for by statute stands upon a different footing than a private party's right to an injunction. The distinction stems from the fact that instead of being a procedural mechanism for protection of private rights, the statutory injunction is a tool for the effectuation of Congressional policy and the vindication of public rights. Thus, the traditional equity concepts of the occasions for the issuance of injunctions do not apply¹⁵ and need for granting statutory injunctive relief is measured

¹⁵It may be noted that Congress has, where it wanted the usual equity principles to apply, made express provision therefor. See 38 Stat. 737 (1914), 15 U.S.C.A. Sec. 26 (1941), providing injunctions "when and under the same conditions and principles as injunctive relief * * * is granted by courts of equity, under the rules governing such proceedings * * * ." See also 29 Stat. 694 (1897) as amended, 42 Stat. 392 (1922), 35 U.S.C.A., Sec. 70 (1940).

by standards of public interest rather than requirements of private litigation.

In a case decided by this Court, *American Fruit Growers v. United States*, 105 F. (2d) 722, 725 (C. C. A. 9th, 1939), a statute similar to Section 2(a)(6) of the Second War Powers Act was involved, in that the provisions for injunction were phrased in terms of grants of jurisdiction. There, the Court stated:

“Appellant contends that the allegations of irreparable injury to the United States are conclusions of law, and that no facts are pleaded which show irreparable injury or that the United States has no adequate remedy at law. We think allegations of such facts were unnecessary, because of 7 U.S.C.A. § 608a(6). Congress apparently concluded that a violation of a valid order would cause irreparable restriction on shipments in that the theory expressed by the act required restriction on shipments and unless the fixed restrictions were complied with, the Act would serve no purpose. By 7 U.S.C.A. § 608a(6) Congress authorized an injunction upon a showing of violation alone.”

The principle was again reiterated by this Court in *Bowles v. Huff*, 146 F. (2d) 428, 430 (C.C.A. 9th, 1944); see also, *United States v. Adler's Creamery, Inc.*, 110 F. (2d) 482 (C. C. A. 2d), certiorari denied 311 U. S. 657 (1940); *Fleming v. Salem Box Co.*, 38 F. Supp. 997 (D. Ore., 1940); *Fleming v. Whittemore*, 41 F. Supp. 767 (D. Ky., 1941.)

2. Appellants do not actually show wherein the Court's finding, that there was a threat of future

violations, was erroneous. The findings concerning the danger of violations in the future read as follows:

“7. Unless restrained and enjoined defendants and each of them threaten to and will continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

8. Unless restrained and enjoined defendants and each of them threaten to and will use and dispose of and put beyond their possession and [17] control sugar obtained by means of invalid sugar ration bank checks.

9. Unless defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

10. Unless defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar.”
(R. 19-20.)

These findings, the appellants claim, were erroneous because no inference could have been drawn by the Court that they would violate in the future, as the acts on which the findings were based had been committed during the time between the expiration date of the Emergency Price Control Act of 1942, June 30, 1946 and the date of its extension, July 25, 1946; and that there was nothing in the complaint or affidavits to show that any violative act occurred after that period.

As shown before, this action was brought under the provisions of the Second War Powers Act, in full force and effect during the hiatus period of the Emergency Price Control Act of 1942. The interval, therefore, on which appellants rely to absolve their violative overdrafts had no effect upon the legality of their acts under the Second War Powers Act. However, even if it were assumed, for purpose of argument, that the provisions of the Third Revised Ration Order No. 3 were inoperative during the hiatus period, the record nevertheless shows that they had violated its provisions subsequent to July 25, 1946.

The Complaint (R. 4) alleged that the acts complained of occurred between July 11, 1946 and August 7, 1946. A certified copy of appellants' Ration Bank Statement with the Union Bank and Trust Company was attached to the affidavit in support of Temporary Restraining Order and Order to Show Cause for Preliminary Injunction. This bank statement clearly shows that on August 1, 1946, well after the termination of the hiatus period, appellants had drawn three

checks totalling 770,000 pounds at a time when their account was already overdrawn by 576,804 pounds of sugar. (R. 13.)

The record contains nothing to support appellants' statement that no reasonable inference could have been drawn by the Court from the facts alleged in the complaint or affidavits, that they would continue to issue invalid sugar ration bank checks in the future. They admit in their brief (p. 35) that they secured large amounts of sugar during the period of July 11 to August 7, 1946, by issuing invalid ration checks. They urge, however, that the Court should have drawn the inference that having so fully supplied themselves, they would no longer do wrong.

This Court has repeatedly affirmed the long-followed principle that the District Court, being in the best position to judge the evidence and testimony in the proceedings below, its findings will not be disturbed by the Appellate Court unless "clearly erroneous." Federal Rules of Civil Procedure, Rule 52(a), 28 U. S. C. A. following Section 723(c); *Augustine v. Bowles*, 149 F. (2d) 93 (C. C. A. 9th, 1945); *Hartford Accident & Indemnity Co. v. Jasper*, 144 F. (2d) 266 (C. C. A. 9th, 1944); *United States v. Cushman*, 136 F. (2d) 815 (C. C. A. 9th, 1943), certiorari denied 64 S. Ct. 194, 320 U. S. 786; *O'Keith v. Johnston*, 129 F. (2d) 889 (C. C. A. 9th, 1942), certiorari denied 63 S. Ct. 256, 317 U. S. 711; *Kelly v. Johnston*, 128 F. (2d) 793 (C. C. A. 9th, 1942), certiorari denied 63 S. Ct. 558, 318 U. S. 798.

Needless to say, appellants' naive argument, that having gorged themselves before the action was

brought it should have been inferred that they would not violate again, is not sufficient to show that the findings of the Court were clearly erroneous.

An application for an interlocutory injunction is addressed to the sound discretion of the trial Court and such an order, either granting or denying such injunction, will not be disturbed by an Appellate Court unless the discretion was improvidently exercised. *Alabama v. United States*, 279 U. S. 231, 49 S. Ct. 266; *Wilson & Co., Inc. v. Best Foods, Inc.*, 300 Fed. 484 (C. C. A. 9th); *Somner v. Rotary Lift Co.*, 66 F. (2d) 809 (C.C.A. 9th). This Court has held that "discretion" is abused "when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial Court. If reasonable men could differ as to the propriety of the action taken by the trial Court, then it cannot be said that the trial Court abused its discretion." *Delno v. Market St. Railway Co., et al.*, 124 F. (2d) 965 (C.C.A. 9th, 1942).

The record shows, and the appellants do not deny, that they had overdrawn their ration bank account to the amount of 1,370,000 pounds of sugar by issuing invalid ration checks. It is easily understood that unless immediately enjoined, there was danger that appellants would dispose of the sugar they obtained through the issuance of these checks before a hearing could be had, thereby denying the general public of its right to a proper allotment and proportion of the sugar available for general public consumption. Unless enjoined, there was also a threat that the appellants

would continue to issue additional sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks. There is nothing in the record to contradict the Court's conclusion. In this case, no reasonable man could even differ as to the propriety of the action taken by the trial Court below.

CONCLUSION.

It respectfully submitted that the contentions of the appellants are plainly without merit, and that the order appealed from should be affirmed.

Dated, April 25, 1947.

Respectfully submitted,

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
Chief, Appellate Branch

ROSE MARY W. FILIPOWICZ,
Attorney

Office of Price Administration
Office of Temporary Controls
Washington 25, D. C.

WILLIAM B. WETHERALL,
Regional Litigation Attorney
San Francisco 4, California

WADIEH SHIBLEY,
Attorney-in-Charge
Los Angeles, California

No. 11,491

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALLEN ZIEGLER, RAYMOND ZIEGLER and
WEST COAST SUPPLY Co. (a partner-
ship),

Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLEE'S NOTICE AND MOTION TO DISMISS THE APPEAL.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

DAVID LONDON,
Director, Litigation Division

ALBERT M. DREYER,
Chief, Appellate Branch

ROSE MARY W. FILIPOWICZ,
Attorney

Office of Price Administration
Office of Temporary Controls
Washington 25, D. C.

WILLIAM B. WETHERALL,
Regional Litigation Attorney
San Francisco 4, California

WADIEH SHIBLEY,
Attorney-in-Charge
Los Angeles, California

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MAY 2 - 1947

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Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

**Appeal from the District Court of the United States for the
Southern District of California, Central Division.**

NOTICE OF APPELLEE'S MOTION TO DISMISS APPEAL.

To: Messrs. Lazarus and Horgan
Attorneys for Appellants
639 South Spring Street
Los Angeles 14, California

Please Take Notice that appellee will move the United States Circuit Court of Appeals for the Ninth Circuit to dismiss the appeal of appellants in the case above named on the grounds set forth in the motion hereto attached; that appellee will so move the said Court at such time as the Court may designate for

oral argument of the case at the United States Court-house, San Francisco, California, or at such other time and place as the Court may by order direct.

Dated, April 25, 1947.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement

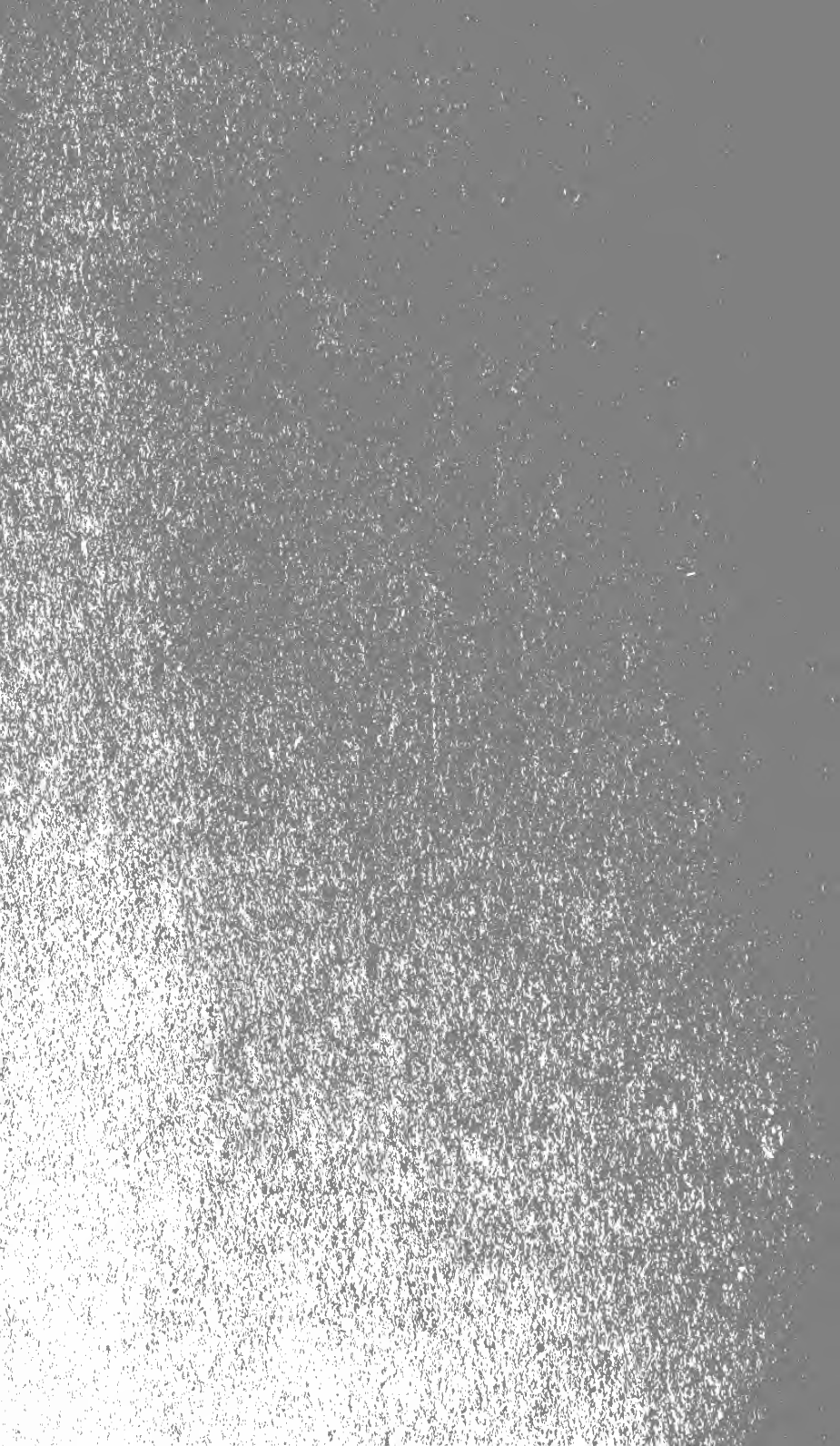
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ROSE MARY W. FILIPOWICZ,
Attorney
Office of Price Administration
Office of Temporary Controls
Washington 25, D. C.

WILLIAM B. WETHERALL,
Regional Litigation Attorney
San Francisco 4, California

WADIEH SHIBLEY,
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PHILIP B. FLEMING, Temporary Controls
Administrator,

Appellee.

**Appeal from the District Court of the United States for the
Southern District of California, Central Division.**

APPELLEE'S MOTION TO DISMISS APPEAL.

The appellee herein moves this Court to dismiss the appeal for the reason that no reviewable questions are presented in the brief filed by the appellants. The record fails to show that any of the issues raised by them were raised, considered or decided below. Every point relied upon has been raised for the first time on this appeal.

It is well established that, whatever the nature of the case, the review by an appellate court is restricted

to such questions and issues as were made and considered below and decided there and no question, not going to the jurisdiction of the Court, can be raised for the first time on appeal. *McCullough v. Kammerer Corp.*, 65 S. Ct. 297, 323 U. S. 327; *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719; *Traglio v. Harris*, 104 F. (2d) 439 (C.C.A. 9th, 1939); *Borchard v. California Bank*, 107 F. (2d) 96, 101 (C.C.A. 9th), certiorari granted 60 S. Ct. 721, 309 U. S. 348, reversed on other grounds 60 S. Ct. 957, 310 U. S. 311, rehearing denied 61 S. Ct. 54, 311 U. S. 724; *Whealton v. Pine Grove Nevada Gold Mining Co.*, 104 F. (2d) 675 (C.C.A. 9th, 1939); *Smith v. Boise City, Idaho*, 104 F. (2d) 933 (C.C.A. 9th, 1939); *Lumbermen's Mutual Casualty Co. v. McIver*, 110 F. (2d) 323, 325 (C.C.A. 9th, 1940); *State of Washington v. United States*, 87 F. (2d) 421, 435 (C.C.A. 9th, 1936).

This practice is founded upon considerations of fairness to the Court and to the parties, and of the public interest in bringing litigation to an end after fair opportunity has been afforded below to present all issues of fact and law. To hold the trial Court guilty of error on an issue to which its attention has never been called would violate this precept. Thus, the appellate courts have consistently declined to enter upon a discussion of questions which the trial Court was given no opportunity to rule upon. *Miller v. Union Pacific Railroad Co.*, 63 F. (2d) 574, reversed on other grounds, 290 U. S. 227, 54 S. Ct. 172; *Brown Sheet Iron & Steel Co. v. Willcuts*, 45 F. (2d) 390; *Weinstein v. Laughlin*, 21 F. (2d) 740.

The appellants challenge the validity of Third Revised Ration Order No. 3 on these grounds: that it is an unconstitutional exercise of the war power of Congress, in violation of the due process clause of the Constitution; that it is invalid because there was no sugar shortage in the United States at the time the preliminary injunction was issued, because there was no need of sugar for the defense of the United States, because the order conflicted with the provisions of the War Mobilization and Reconversion Act; and finally, that it was invalid at the time of defendants' illegal acts because it was inoperative at that time. In addition, they claim that the plaintiff below made no showing in the complaint or affidavits of impending or threatened acts on the part of the defendants and the District Court, therefore, erred in issuing the preliminary injunction.

Yet, the record brought up by the appellants is devoid of any indication that the questions raised by them on appeal were ever presented to the Court below for consideration and decision. It is apparent that they are endeavoring to use this Court as a forum for a hearing *de novo*.

The Fourth Circuit Court of Appeals disposed of such a maneuver in *Hutchinson v. Fidelity Inv. Association*, 106 F. (2d) 431 (1939), with the following words:

“The briefs discuss all sorts of questions not raised below but we need not consider them. The rule is well settled that only in exceptional cases will questions, of whatever nature, not raised and

properly preserved for review in the trial court, be noticed on appeal.”

The questions presented by the appellants should have been raised either by a motion below to dissolve the preliminary injunction or be reserved for the trial Court’s consideration when a hearing is set on the motion for permanent injunction.

It is, therefore, respectfully submitted that for the reasons outlined, the appellants’ appeal should be dismissed.

Dated, April 25, 1947.

WILLIAM E. REMY,

Deputy Commissioner for Enforcement

DAVID LONDON,

Director, Litigation Division

ALBERT M. DREYER,

Chief, Appellate Branch

ROSE MARY W. FILIPOWICZ,

Attorney

Office of Price Administration

Office of Temporary Controls

Washington 25, D. C.

WILLIAM B. WETHERALL,

Regional Litigation Attorney

San Francisco 4, California

WADIEH SHIBLEY,

Attorney-in-Charge

Los Angeles, California

No. 11492

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

P. G. WINNETT,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

BRIEF OF APPELLEE.

FILED

MAY 29 1947

MACFARLANE, SCHAEFER & HAUN,
417 South Hill Street, Los Angeles 13,

DEMPSEY, THAYER, DEIBERT & KUMLER,
523 West Sixth Street, Los Angeles 14,

Attorneys for Appellee.



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No. 11492
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

P. G. WINNETT,

Appellee.

BRIEF OF APPELLEE.

Statement.

The statement as prepared by appellant's counsel is acceptable with the exception of that portion on page 8 reading as follows:

"The court made no specific finding or conclusion as to whether the taxpayer had or had not committed an act or acts of bankruptcy though the parties and the court treated the elements embraced in the provisions of Section 3466 of the Revised Statutes as issues raised in the case [R. 81, 85, 88, 89, 95, 96, 101, 129].

"Emma A. Summers had committed acts of bankruptcy before and after the basic dates as will be hereinafter shown in the argument."

We disagree with the statement that the parties and the court treated the elements embraced in the provisions of Section 3466 of the Revised Statutes as issues raised

in the case or that any issue was made as to whether Emma A. Summers had committed acts of bankruptcy. The references by counsel to the record do not support the statement, but, in fact, support the contrary, *i. e.*, that counsel for defendants objected to such issue, to the filing of an amended complaint to include such issue, and the court sustained these objections and refused to permit the filing of such proffered amended complaint [R. 95, 96, 101-104, 105, 106].

Summary of Argument.

On and after January 1, 1939, Emma A. Summers, a creditor of P. G. Winnett, was an insolvent person, and P. G. Winnett was entitled to off-set against his indebtedness to Summers all claims which he held against her, whether matured or unmatured, and to have determined the net balance remaining and was liable to Summers or her successors in interest only for this net balance. The appellant's lien for taxes filed February 16, 1939, and the purported levy and demand made March 22, 1939, could rise no higher than Summers' rights against Winnett and attached only to the property or rights to property that Summers had, and such property or rights to property are determined by the laws of the State of California, and through the application of such law appellant is limited, as Summers would have been limited, to the sum of \$6,466.64, plus interest, and neither the lien of appellant, its purported levy and demand, nor the provisions of Section 3466 of the Revised Statutes, operated to deprive Winnett of the set-offs alleged and proved. We will first discuss the argument of counsel for plaintiff and follow this with our argument, points and authorities.

ARGUMENT.

I.

In Answer to Appellant's Point I:

Counsel for appellant make an erroneous application of Section 3710 (a) and (b) to the instant case and overlook the essential elements thereof. There was no distraint upon P. G. Winnett on March 22, 1939, or at any other time. Under Section 3710 a levy is a prerequisite, and a mere notice does not constitute a levy [Exs. 4, 5]. *United States v. Aetna Life Insurance Co.*, 46 F. Supp. 30, 29 A. F. T. R. 1123, 1130; *United States v. O'Dell* (C. C. A. 6), 160 F. (2d) 304. In this latter case a notice and demand similar to that in the instant case was given. The court held this did not amount to a levy and stated:

"This paragraph described a mere statement or notice of claim. Nothing alleged to have been done amounted to a levy which requires that the property be brought into legal custody through seizure, actual or constructive, levy being 'an absolute appropriation in law of the property levied upon' (citing cases)."

Nothing, therefore, was accomplished by the notice of March 22, 1939, and P. G. Winnett's rights were, therefore, not affected by that notice. Even if the levy was effectual it gave the appellant no rights beyond those of Emma A. Summers (Point IV, *infra*).

II.

In Answer to Appellant's Point II:

As pointed out in answer to Point I, no rights of appellant arose on March 22, 1939. It is conceded that the appellant had a lien on February 16, 1939, but it is contended that this lien affected only the property and rights to property of Summers, an insolvent person on that date [R. 115]. The determination of what constituted her property is a matter of State law. *U. S. v. Malcolm*, 282 U. S. 792, 75 L. Ed. 714; *U. S. v. Roberts*, 269 U. S. 315, 70 L. Ed. 285; *Warburton v. White*, 176 U. S. 484, 44 L. Ed. 555; *Hines v. Martin*, 268 U. S. 458, 69 L. Ed. 1050; *Burgess v. Seligman*, 107 U. S. 123, 27 L. Ed. 359; *Lippencott v. Mitchell*, 94 U. S. 766, 24 L. Ed. 315; *United States v. Penn Mutual Life* (D. C., E. D., Pa.), 44 F. Supp. 804, 29 A. F. T. R. 405, where on page 407 the court states:

“This court is bound by the law of Pennsylvania as to what constitutes property.”

As will be more fully pointed out later (Point IV, *infra*) the laws of California when applied in this case fixed the property and rights to property of Summers at \$6,466.64, plus interest. It may be, as stated by counsel for appellant, that State laws are ineffectual to supersede, impair or modify the statutory rights of the United States as to the priority of its liens and claims, but such decisions are not helpful since we are first concerned with the property or rights to property to which this lien attached. Counsel in discussing set-off cites some early California cases with the statement that they had not been overruled

or expressly modified. That may be, but these cases arose prior to 1927 when Sections 437 and 438 of the Code of Civil Procedure [Appendix, *infra*] were amended and which code sections now govern the right of set-off and counter-claim, and the decisions clearly establish Winnett's right to set off his demands as we will show (Point IV, *infra*).

Appellant contends (Appellant's Brief 20) that there was no mutuality between the off-sets of Winnett and those of the taxpayer, citing authorities which, however, do not support its statements. Mutuality has been defined, "The doctrine of mutuality requires that the debts be to and from the same persons in the same capacity." *Peterson v. Lyders*, 139 Cal. App. 303, 306, 33 P. (2d) 1030; certiorari denied, 294 U. S. 716.

Winnett had a contractual relation with Summers [R. 185, Ex. E, F] and by which Summers' obligations to him arising out of his endorsement of her notes at the Bank were directly deductible from his obligation to her evidenced by the \$60,000.00 promissory note [Ex. C]. Certainly the debts were due to and from the same persons in the same individual capacities. The action of the Appellant could not disturb this original mutuality. Furthermore, when Winnett satisfied his guaranty and endorsement to the Bank, a further direct obligation from Summers arose in his favor as a matter of law.

Since 1927 the law is well settled that the off-sets or credits need not arise out of the same transaction. Cal. Civ. Code 438 (Point IV, *infra*).

Winnett's rights of set-off were not obtained after February 16, 1939, but were in existence as early as sometime after December 20, 1935 [R. 194, 250], and the \$60,000.00 promissory note contained an endorsement, "May 26, 1938. This note subject to an agreemet set forth in my letter to Mr. P. G. Winnett dated May 26, 1938 (signed) J. M. Woods.", giving notice of his rights [Ex. 12, C., R. 224, 225]. Also [Ex. E, F]. Even though the obligations were not paid until May 17, 1939, the right of set-off existed immediately upon the insolvency of Summers (January 1, 1939). The Government's lien attached only to Summers' property (her interest in the note which of itself gave notice of Winnett's rights) and was subject to her agreement with Winnett and to Winnett's rights arising by reason of such insolvency. Counsel state that Winnett purchased the Summers' notes from the Bank, but this is contrary to the evidence. Winnett's payment to the Bank was in satisfaction of his liability to it as an endorser of these notes [R. 90, 252, 253, 254, 258, 471]. The liability of an endorser is direct and primary (Sec. 3144, Cal. Civ. Code, Appendix, *infra*). As an endorser paying the obligation he immediately became entitled to recover from the maker (Sec. 3202, Cal. Civ. Code, Appendix, *infra*). This right flowed as a result of the endorsement and was in addition to the direct written agreements from Summers. The Bank could demand payment of the entire sum of principal and interest by reason of default by Summers in the payment of interest, which it did on May 17, 1939. *Righetti v. Monroe*, 109 Cal. App. 333 at page 336.

Winnett also had the right to off-set the \$2400.00 installment note under the agreement of December, 1938, which was then in default [R. 122]. The cases cited by counsel have been reviewed, and we believe that they do not affect our position. *Glass City Bank v. United States* holds only that the lien attaches to property owned by the taxpayer. *In re Lambertson Rubber Co.* held that the taxes were liens of a character which would become simple priorities under the Bankruptcy Act. *Citizens State Bank of Barstow* held that the tax lien covered the property and rights to property as of the date upon which the assessment list was received in the Collector's office. *MacKenzie v. United States* held that the tax lien took precedence over a writ of attachment subsequently levied. *United States v. Greenville* held that the tax lien took precedence over state and municipal liens which had not yet been perfected. While Winnett is not among the classes excepted in Section 3672, this is immaterial since he can always show that there was no property or property rights of the taxpayer in his possession, and did show that such rights were limited to the sum of \$6,466.64, and interest. The additional cases of *U. S. v. Oklahoma*, *U. S. v. Wadell*, *New York v. McClay* and *People of Illinois v. Campbell*, cited by counsel, do not aid appellant, since these decisions govern priority of the U. S. over unperfected liens and do not go into the question of the property itself which became the subject of the lien.

III.

In Answer to Appellant's Point III:

Section 3466, Revised Statutes, creates no lien but establishes a priority. *United States v. Wadell*, 323 U. S. 353, 89 L. Ed. 294. And if applicable at all applied only to the balance due from P. G. Winnett to Summers after giving effect to the credits and off-sets. *U. S. v. Geiger*, D. C. Ark., 26 F. Supp. 624, where it is stated:

“This section does not create a lien but merely gives priority to claims of U. S. after legal title has passed from debtor.”

The priority does not attach until the debtor has been divested of his property in one of the modes stated herein, in which case the person who is vested with the title becomes trustee for the United States and is bound to pay its claim first out of the property. *In re Baltimore Pearl Hominy Company*, D. C., Md. 1923, 294 Fed. 921. Reversed on other grounds, C. C. A. at 925, 5 F. (2d) 553. *In re C. J. Rowe & Bros.*, D. C., Pa. 1927, 18 F. (2d) 658.

In *Bramwell v. United States Fidelity & G. Co.*, 269 U. S. 483, 70 L. Ed. 368, the court in speaking of Sections 3466 and 3467 states:

“Taken together these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent as the rights and priorities of creditors may be made to appear.”

Winnett is not a person charged with the duty of liquidating Summers' financial condition.

That the right of set-off is recognized as to insolvent creditors is sustained by the following authorities:

Schuler v. Israel and the Laclede Bank, 120 U. S. 506, 30 L. Ed. 707;

Carr v. Hamilton, 129 U. S. 252, 32 L. Ed. 669;

Scott v. Armstrong, 146 U. S. 510, 36 L. Ed. 1059;

Armstrong v. Warner, 49 Ohio S. T. 376, 17 L. R. A. 466;

Jandrew v. Guaranty State Bank, 294 Fed. 530;

Studley v. Boylston National Bank, 229 U. S. 523, 57 L. Ed. 1313;

New York County National Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380;

Fidelity and Deposit Company of Maryland v. Duke, 293 Fed. Rep. 661, which states at page 665:

“And in any such set-off is no preference, for only the excess is justly owing or assets to whom due, insolvent or not.” (Citing *Scott v. Armstrong*, *supra*.)

The foregoing support the general statements contained in 28 American Jurisprudence 792:

“The allowance as a set-off of a claim acquired prior to the insolvency proceedings is based upon the idea that where the right of set-off exists at such time, the debtor equitably owes only the balance over and above the amount which the insolvent owes him, and this is the debt that passes to the trustee in insolvency, assignee for creditors or receiver, and hence that the allowance of the set-off does not amount to a preference.”

With respect to the argumentative matter under Point III, it is the Appellee's contention that no act of bankruptcy was committed by the taxpayer on December 20, 1935, in connection with the debt evidenced by the \$60,000.00 note here under consideration. It must be borne in mind that when the Appellant's taxes accrued for 1927 Summers was a woman of wealth, having assets of at least \$609,000.00 [R. 182] consisting of \$275,000.00 cash and promissory notes of one John G. Bullock and defendant P. G. Winnett aggregating \$333,000.00 [R. 182]. She may have been worth \$1,000,000.00 [R. 509]. During the time from 1927 to December 20, 1935, said Bullock and the defendant Winnett had paid her in cash on account of said notes at least \$313,000.00 [R. 182]. On December 20, 1935, she was known to have at least \$60,000.00, *i. e.*, the balance due from Winnett of \$20,000.00 and \$40,000.00 cash, and nowhere does the evidence show that she had disposed of the approximately \$550,000.00 received by her from 1927 to that date. Winnett's transactions with her were in the ordinary course of business and not dissimilar to those that had existed for approximately 8 years [R. 182]. She appeared to be a woman of peculiar business characteristics, and during the course of years had carried notes in the names of other persons and with whose interest therein Winnett was unfamiliar [R. 186]. Winnett, therefore, had no reason to consider the transaction of December 20, 1935, as being any different than her usual conduct of business. She informed him that Woods was her brother [R. 184]. Summers, whether acting in her own name or in the name of Woods, continued to hold the \$60,000.00 note and to have it in her possession until at least October 24, 1941 [R. 232]. This transaction constituted no concealment of her assets since the note represented a portion of her assets. It was amply

secured, and Winnett stated that he could have paid it in cash at any time [R. 186]. The fact that Winnett was President of Bullock's nor his testimony concerning the transaction does not disclose any intent on his part to aid her in concealing her assets. We think the following quoted testimony explains his action [R. 183]:

"But she told me she felt I was under an obligation, that she didn't expect Mr. Bullock to die and she would be deprived of that six per cent on that note, and she thought I should take care of it. And she was either a good salesman, or I was a little soft-headed, but I had—I was the one who suggested that this time it be a secured note, and that stock was put up with S. F. McFarlane, as a trustee. I felt in case of my death her note should be properly protected, and it looked like a better business arrangement anyway. These transactions with Emma Summers extended over a period of 14 years. She was 69 years of age when we started our negotiations originally, and there were very few months in that 14 years that I didn't see her personally."

Counsel stress the oral agreement on the part of Woods (Summers) by which amounts paid by Winnett would be credited on the \$60,000.00 note (Appellant's Br. 23). Since Summers was acting under a power of attorney as attorney-in-fact for Woods she could make binding commitments on his behalf [Ex. D]. Nor do we find anything significant in the fact that Winnett, a business man as Appellant points out, should obtain a written agreement and destroy the negotiability of the \$60,000.00 note when he heard the taxpayer was in difficulties or otherwise. If Woods were a real person, how can Appellant assume that the agreement on the part of Summers would be a breach of trust and invalid as to Woods? It is quite possible

that she could have had business dealings with Woods which permitted this. This argument, however, is purely speculative since it has been found that Woods and Summers were one and the same person. Appellant's statement on page 24 that the transfer of the \$60,000.00 consideration for the original note was done by the taxpayer with intent to hinder, delay or defraud her creditors and that Winnett actively participated in such intent and accomplishment with knowledge is wholly without support in the evidence and is contrary to the findings of the trial judge who had the opportunity to observe this witness and to conclude as to his credibility and good faith.

Appellant's statement of the law respecting presumption (Appellant's Br. 24) is erroneous. The law is (Cal. C. C. P. 1963) "That a thing once proved to exist continues so long as is usual with things of that nature." A condition of insolvency on a particular date does not cause a presumption that it existed before that date. The law appears to be that no inference arises from an adjudication of bankruptcy that the bankrupt was insolvent within the meaning of the Act four months before he was adjudicated such. *Liberty National Bank v. Bear*, 265 U. S. 365, 68 L. Ed. 1057; Anno. 11, Ann. Cas. 452, and quoting from the Anno. 11, Ann. Cas. 452:

"Proof that a man was insolvent on a certain day does not justify an inference that he was insolvent on a day sometime prior thereto. Many contingencies such as unwise investments, losing contracts, misfortune or accident might happen to reduce a person from a state of solvency to one of insolvency within a short space of time."

The trial court determined from the evidence that the insolvency of Summers was from January 1, 1939.

The execution of the written agreements in favor of Winnett on May 26, 1938, and August 26, 1938 [R. 121, 221, 222] does not constitute a preference since so far as the record discloses they were made in the ordinary course of business, and there is no finding of insolvency at the time.

But even if such written instruments constituted a preference they were not void but would have been voidable had bankruptcy ensued within four months after it was made. 11 U. S. C. A. Sec. 96; Remington on Bankruptcy (5th Ed.), Vol. 4A, Sections 1657, 1693. It is not unlawful for an insolvent debtor to prefer a creditor. *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582, 57 L. Ed. 652; *Riedell v. Lydick*, 176 Okla. 204, 55 P. (2d) 465, 466.

Whether an act of bankruptcy was committed when the Appellant obtained its lien on February 16, 1939, or when Appellant obtained its judgment on August 5, 1946, would be immaterial to the determination of this case (Point IV, *infra*). In fact, one of the cases cited by Appellant, that of *Bramwell v. U. S. Fidelity Company*, 269 U. S. 483, contains this very significant quoted language (Appellant's Br. 27, 28):

“The Act applies to all debts due from deceased debtors whenever their estates are insufficient to pay all creditors, and extends to all debts due from insolvent living debtors when their insolvency is shown

in any of the ways stated in Sec. 3466. The decisions of this court show that no lien is created by the statute; that priority does not attach while the debtor continues the owner and in possession of the property; that no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and that, 'whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.' *Beatson v. Farmers' Bank, supra*, 133, and cases cited; *United States v. Oklahoma*, 261 U. S. 253, 259."

And this court in its decision in *U. S. v. Sampsell*, 153 F. (2d) 731, apparently quotes with approval from the case of *In re Van Winkle*, 49 Fed. Supp. 711, D. C. Ky. 1943, in discussing Section 3466:

"The court held that an equitable lien of surety, upon payment of the claim against the bankrupt by the surety, may be related back to the date of the contract and assignment of the retained percentage to defeat the Government's lien which arose prior to the date of actual payment, but was not prior to the date of the contract and assignment. . . . The trustee acquires no better title than the bankrupt himself had."

Appellant's statement (Appellant's Br. 29) that P. G. Winnett was a trustee for the United States is an erroneous assumption and is not borne out by the authorities cited nor by the findings of the court below. The record

discloses only the relationship of debtor and creditor existing between Winnett and the taxpayer.

But admitting for the purpose of argument only that Summers committed acts of bankruptcy as early as 1935 and was an insolvent person, since Section 3466 gives rise to no lien, such insolvency operated to give Winnett the benefit of the State law with respect to his credits and off-sets and gave Appellant priority as to the balance when Summers was divested of said balance. This is the debt that passes to the trustee in insolvency, assignee for creditors, or receivers, and upon such divestment the Appellant acquires priority. As we pointed out under our Point II the determination of what constituted the property of Summers is a matter of State law. *United States v. Malcolm, supra*; *United States v. Roberts, supra*; *Warburton v. White, supra*; *Hines v. Martin, supra*; *Burgess v. Seligman, supra*; *Lippencott v. Mitchell, supra*; *United States v. Penn. Mutual Life*, and the right of set-off and counterclaim is likewise a matter of State law. *Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810; *Woodland Farm Dairy Co. v. Dairy R. Co.*, 282 Fed. 278.

IV.

The Only Property or Rights to Property Had by Summers and Here Involved, Was the Unpaid Balance of the Winnett Note After Deducting the Credits and Off-Sets. Such Rights of Set-Off and Credits Could Be Asserted Against Appellant Regardless of Its Lien, Its Purported Distraint and Section 3466 Revised Statutes.

A. The Only Property or Rights to Property Had by Summers and Here Involved, Was the Unpaid Balance of the Winnett Note After Deducting the Credits and Off-Sets.

On December 20, 1935, Winnett was indebted to Summers in the sum of \$20,000.00 as the balance due on an original promissory note executed by one John G. Bullock and Winnett in the sum \$333,000.00. On that date he borrowed an additional \$40,000.00, gave a new note for the combined sum of \$60,000.00 and secured it by collateral consisting of 1800 shares of the capital stock of Bullock's, Inc. Thereafter Winnett had an oral agreement with Summers (acting in the name of Woods) that her said promissory notes which he might endorse at the Citizens Bank, if unpaid, could be deducted from the \$60,000.00 note [R. 182, 183, 184, 185]. This agreement was thereafter evidenced by two writings [Ex. B, F] and further claimed off-sets were evidenced by writings [Ex. G, H and O]. Summers was insolvent on and after January 1, 1939 [R. 115]. Appellant asserted a tax lien February 16, 1939, upon property or rights to property of Summers. On March 22, 1939, appellant gave a notice of purported levy to Winnett which was ineffectual for any purpose (Point II, *supra*). May 17, 1939, the Citizens Bank called the Summers notes for payment and made demand upon Summers and Winnett as the endorser [Ex. I]. Pursuant

to this demand Winnett paid the notes. The Bank endorsed and delivered the notes to him so that he could proceed against the maker. This was not a sale of the notes and Winnett was not purchasing them as stated by appellant, but he made payment in extinguishment of his indebtedness and guarantee [R. 94, 95, 123, 124]. Winnett's right of set-off and counterclaim is statutory and is governed by Sections 437 and 438, California Code of Civil Procedure [Appendix *infra*]. Under the decisions since the adoption of said code sections in 1927, the right of set-off and counterclaim may be asserted in the action instituted by appellant. *Bond v. Farmers and Merchants National Bank*, 64 Cal. App. (2d) 842, at page 845:

"There is nothing contained in this section to indicate that the Legislature intended that the counterclaim must have existed at the time of the commencement of the action. The existing statute was the evident attempt on the part of the lawmakers to establish a new law for the regulation of the pleading of counterclaims. Inasmuch as it is a complete statute in itself without reference to the superseded section, a reasonable interpretation is that the Legislature undertook to formulate a plan complete in itself without reference to the original provision upon that subject. It appearing that the Legislature's intention was to revise the entire subject matter of section 438 it must be presumed that they intended to substitute a new law for that which had formerly existed, and that any content of the old statute not repeated should be considered as repealed by the new even though there be no inconsistencies between the two. (*Mack v. Jastro*, 126 Cal. 130, 132 (58 Pac. 372); *Stockburger v. Jordan*, 10 Cal. (2d) 636, 646 (76 P. (2d) 671); *Jewett v. City Transfer & Storage Co.*, 128 Cal. App. 556, 561 (18 Pac. 2d 351). The enactment of the new

statute will not be considered as repealing by implication but rather it is to be understood that the later legislative attempt is a revision of the entire subject matter embodied in the successive legislative enactments and that the latest was designed as a substitute for all preceding acts. Whatever of the old is excluded from the new must be ignored. All the limitations upon the right to counterclaim not found in section 438 as amended must be deemed to have been abolished by the new section. (*Buckman v. Tucker*, 9 Cal. (2d) 403, 408 (71 P. (2d) 69); *Todhunter v. Smith*, 219 Cal. 690, 603 (28 P. (2d) 916; *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 435 (292 Pac. 474).)''

Even without the question of insolvency, the set-off was properly due at the time of suit. *Cohen v. Bonnell*, 14 C. A. (2d) 38; *St. Louis National Bank v. Gay*, 101 Cal. 286, at page 292.

Where the question of insolvency arises the right of set-off immediately arises whether the alleged set-off is based upon a contingent obligation, an immature obligation, or a conditional obligation, and this proceeds upon the theory that insolvency renders all debts due and furnishes of itself a sufficient ground for set-off. These propositions of law are sustained by the case of *Harrison v. Adams*, 20 Cal. (2d) 646 (one of the latest expressions), and we quote from this decision beginning on page 648:

''Concerning the rights of the appellant to the money on deposit as against the assignee of the judgment for a valuable consideration, *it is well settled that a court of equity will compel a set-off when mutual demands are held under such circumstances that*

one of them should be applied against the other and only the balance recovered. The insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable principle. (Citing cases.) (Emphasis ours.)

And a judgment debtor who has, by assignment or otherwise, become the owner of a judgment or claim against his judgment creditor, may go into the court in which the judgment against him was rendered and have his judgment off-set against the first judgment. (Citing cases.) The fact that the demand of the plaintiff has not been reduced to judgment is no obstacle to its allowance as a set-off against a judgment. (Citing cases.) Such a set-off may be compelled even against an assignee of the judgment who took without notice and for value. (Citing cases.)

It has also been held that under section 368 (Appendix *infra*) of the Code of Civil Procedure the debtor may set off claims against the creditor which were acquired after the assignment of the judgment to a third person but prior to notice to the debtor of the assignment. (Citing cases.) 'Whatever may be the rule as to notice in other states, however much or little the courts may have permitted themselves to be influenced by equitable considerations in favor of the assignee, the fact remains that in this state there is no room for the exercise of discretion upon this question. The rule is one rigidly fixed by statute' (Citing cases.)

But the assignee must be the beneficial owner of the claim or judgment in order to use it as a set-off against a judgment against him. (Citing cases.) And mutuality is essential, that is, the judgments must be between the same parties in the same right. (Citing cases.) In determining whether demands are mutual, *equity will look to the real parties in interest.* Thus

there may be a set-off of judgments where the real and beneficial owner of one of them is the debtor upon the other, although an assignee for collection is the nominal owner of the first judgment. (Citing cases.)” (Emphasis ours.)

Another decision sustaining this is *Gordan v. Foote*, 120 Cal. App. 76. This was an action by a receiver of an insolvent lessor to recover unpaid rents from the lessee. The question was whether defendant was entitled to off-set \$15,000.00 paid to the lessor as security for the rent under the lease due to the fact that the deposit was not returnable until the thirty-first month and then only at the rate of \$357.00 per month and upon condition that defendant execute a chattel mortgage on the furnishings. The court stated on page 79:

“The propriety of allowing the off-set is at once apparent and in view of the fact that the lessor had become insolvent it is immaterial that under the terms of the lease the return of the deposit was not yet due. In *City Investment Co. v. Pringle*, 73 Cal. App. 782 (239 Pac. 302), the court reviewed the authorities relating to setoffs against insolvent debtors and there said at page 791, ‘ . . . insolvency itself is a sufficient ground for the application of equitable setoff, and the fact that the indebtedness on one side is not due when setoff is claimed constitutes no obstacle to the assertion of the right as against an insolvent debtor.’ ” (Emphasis ours.)

The case of *City Investment Co. v. Pringle*, 73 Cal. App. 782, cited in the foregoing case was an action where the plaintiff sued for rents, and the defendant set up a

counterclaim for a deposit, and the facts showed that the plaintiff was insolvent. The court on page 791 stated:

“The majority of the cases wherein the rule has been applied have been those in which a bank has sought to set off the unmatured indebtedness of an insolvent depositor to it as against a claim for the deposit by the depositor or his representative or as against the assignee of such depositor. The principle, however, applies in all cases where a right of the insolvent is asserted, and in accordance with equitable principles set-off should be permitted. As held in *Nashville Trust Co. v. Fourth Nat. Bank*, *supra*, cited with approval in the cases of *Pendleton v. Hellman Com. etc. Bank*, *supra*, and *Coonan v. Loewenthal*, *supra*, insolvency itself is a sufficient ground for the application of equitable set-off, and *the fact that the indebtedness on one side is not due when set-off is claimed* constitutes no obstacle to the assertion of the right as against an insolvent debtor.” (Emphasis ours.)

In *Machado v. Borges*, 170 Cal. 501, the court with respect to this equitable right of set-off stated at page 502:

“It is well settled that a court of equity will compel a set-off of mutual demands, where such relief is necessary to enable the party claiming the relief to collect his claim. (*Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596.)

The insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable remedy. (*Hobbs v. Duff*, 23 Cal. 626, 627.)”

Again in *People v. California etc. Trust Company*, 168 Cal. 241, a question arose as to the right of set-off against the receiver of an insolvent bank. At page 246 the court stated:

“‘The general rule is that a receiver acquires no greater interest in an estate than the one from whom he takes, and it follows that choses in action pass to him subject to any right of setoff existing at the time of his appointment.’ (Pomeroy’s *Equitable Remedies*, Vol. 1, Secs. 186, 187.) This rule applies in the case of insolvent banks, so that the right of setoff is to be determined by the condition of things as they existed at the moment the bank became insolvent.”

At page 250 the court stated:

“The creditor may be insolvent, and it is well settled that the insolvency of a party against whom a setoff is claimed constitutes a sufficient ground for the allowance of a setoff not otherwise available.”

And in *Arp v. Blake*, 63 Cal. App. 362, the court on this same question, at page 367 stated:

“The right of set-off exists when the parties hold cross-demands under such circumstances that in equity they should be applied one against the other and only the balance be recovered.” (Citing cases.)

In addition to the legal rights established by the foregoing decisions, there was an absolute agreement on the part of Summers authorizing and permitting the right of set-off which established a far greater mutuality than the cases cited.

B. Such Rights of Set-Off and Credits could be Asserted Against Appellant Regardless of Its Lien, Its Purported Distraint and Section 3466 Revised Statutes.

The appellant by its lien or by its purported distraint proceedings acquired rights no higher than those of Summers and, in fact, held the position of a garnishee. *United States v. Bank of United States*, 5 Fed. Supp. 942, the court stating:

“It is settled law, as shown by the case of *North Chicago Rolling-Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565, that when one seeks to reach a chose in action owned by one’s debtor by garnisheeing it by notice to the obligor thereof, the rights of the garnisher cannot be greater than those of his debtor, *i. e.*, the obligee of the chose in action. This was very clearly stated in the case just mentioned by Mr. Justice Jackson in 152 U. S. at page 619, 14 S. Ct. 710, 717, 38 L. Ed. 565. After discussing some English cases on the question of the rights secured by such a garnishment and quoting from the remarks of some of the Lord Justices in the case of *In re Combined Weighing & Advertising Machine Company*, 43 Chancery Division, 93, 104, 105, 106 in which the effect of garnishment was under consideration, Mr. Justice Jackson said: ‘The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above, or extend beyond, those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in, had the principal debtor’s claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor, is a measure of his liability to the attaching creditor, who takes the shoes

of the principal debtor, and can assert only the rights of the latter.'

* * * * *

It would be most unfair that a third person, merely by reason of his interposition, whether he was a sovereign or not, should be able to change the rights inter sese between the obligor of the chose in action and his obligee, who is the objective of the levy or attachment."

This same holding appears in *Karno-Smith Company v. Maloney*, Third Circuit, 112 F. (2d) 690, 25 A. F. T. R. 268, an action arising under Section 1114(e) of the Revenue Act, now 3710(a) I. R. C. The Court there held that the rights of the Internal Revenue Collector could rise no higher than those of a taxpayer whose right to property is sought to be levied on under the statute. It held that an insolvent subcontractor had no enforceable right to property in the hands of the general contractor, in view of the contractor's right under New Jersey law to set-off against the balance due the subcontractor, the contractor's obligation, under statutory bond, to the subcontractor's materialman, so as to justify distraint by the Collector of the balance due for the subcontractor's income taxes. The Court pointed out that the right of off-set recognized by New Jersey law was available to the plaintiff, and that by reason of its existence the New Jersey Brick & Supply Co., the insolvent subcontractor, had no enforceable right to property in the plaintiff's hands which was subject to attachment or distraint at the instance of the Supply Company's creditor, the Collector of Internal Revenue. It ac-

cordingly found that the distraints which the latter made were, therefore, not authorized by law and that the sum exacted from the plaintiff was wrongfully collected and should be refunded, stating (p. 692):

“We think the equities of the case are clearly with the plaintiff. It finds itself in a dilemma forced upon it by law. Under its contract it is obligated to its subcontractor and under its bond it must pay the latter’s unpaid debt to its materialman. The two obligations arise out of the same transaction, but payment of the subcontractor’s taxes pursuant to the collector’s levy and demand will not and cannot discharge the obligation to the subcontractor’s materialman which the statutory bond imposes upon the plaintiff. Under these circumstances it would be manifestly inequitable to enforce both obligations. *United States v. Bank of Shelby*, 5 Cir., 68 F. (2d) 538. We think it clear that in a case of this kind the rights of the collector rise no higher than those of the taxpayer whose right to property is sought to be levied on. *United States v. Western Union Telegraph Co.*, 2 Cir., 50 F. (2d) 102.”

Even the case of *Commonwealth Bank v. United States*, 6 Cir., 115 F. (2d) 327, 25 A. F. T. R. 982, cited by appellant, holds that a defense exists where there is no property or property rights of the taxpayer in the defendant’s possession.

It has been held in California in *John M. C. Marble Co. v. Merchants National Bank of Los Angeles*, 15 Cal. App. 347, 115 Pac. 59, that an attaching creditor merely acquires the rights of the debtor and that a plaintiff in garnishment is in relation to the garnishee substituted merely to the rights of his own debtor, and he may enforce no de-

mand against the garnishee which the debtor in suing could not enforce, the Court stating at p. 350:

“An attaching creditor is clothed with no greater rights than the debtor himself. He stands in the shoes of the debtor, and any offset which might be urged against the debtor by the garnishee is equally available against the attaching creditor. ‘The suing out of a process in garnishment does not in any manner change the rights of the parties to the proceeding further than to transfer the right of the defendant to his creditor to proceed against the garnishee for the collection of the debt due to the principal defendant. It is a rule of universal application that the plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and can enforce no demand against the garnishee which the debtor himself, if suing, would not be entitled to recover. . . . Another effect of this rule is that the plaintiff is liable to be met by the garnishee on his own behalf with the same set-offs and other defenses that the garnishee might have interposed had an action been brought against him by his own creditor, the principal defendant in the garnishment proceedings.’ *Shinn on Attachment*, Sec. 487, *Drake on Attachment*, Sec. 536; *Boles on Modern Law of Banking*, p. 741; *Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. 648, 30 L. Ed. 707.”

The Case of *United States v. Long Island Drug Company*, 2nd Ct., 115 F. (2d) 983, has been clarified in part by a later decision, but the following language is still apt:

“. . . Moreover, there would seem to be no justice in depriving the garnishee of its right to set-off which, so far as the record shows, was acquired for a valuable consideration before the demand was made on the Drug Company by the Collector.”

Since the Appellant occupied the position by virtue of its lien of an assignee or of a garnishee, there is no question of Winnett's right to assert his set-offs against the plaintiff. *McKenney v. Ellsworth*, 165 Cal. 326, citing 368 Cal. C. C. P.

This rule is also supported by the following authorities:

United States v. Bank of Shelby, 5th Ct., 68 F. (2d) 538, 13 A. F. T. R. 540. On page 541 it is stated:

“The general rule in the absence of statute is that to set off an unmatured debt because of insolvency requires the action of equity; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059; *Hecht v. Snook*, 114 Ga. 921, 41 S. E. 74; but that insolvency alone is a sufficient basis in equity for the set-off not only as between the parties but as against a receiver, an assignee for the benefit of creditors, a trustee in bankruptcy, or a garnisher. (Citing *Scott v. Armstrong* and numerous cases.)”

There seems to be no question but that in California all defenses and set-offs against an assignor of a chose in action are available against his assignee. The cases above cited with respect to insolvent creditors bear this out. Another case to the same effect is *Bank of America v. Pacific Ready-Cut Homes*, 122 Cal. App. 154, and in *Wagner v. Central Bank and Securities Company*, 249 Fed. 145, it is stated:

“All defenses and set-offs available against an assignor of a chose in action are available against his assignee.”

Since Winnett's right of set-off existed at the earliest moment that Summers became insolvent, it existed on February 16, 1939. The effect thereof is to limit Summers'

property or rights to property on that date and all subsequent dates to the balance of Winnett's indebtedness after giving effect to the set-offs. With respect to this balance defendant has always conceded that the Appellant's rights are paramount to the rights of all other persons who had no perfected liens at the time.

We have found one case, entitled *In re Dimons Estate*, 32 N. Y. Supp. (2d) 237, wherein the facts are similar to ours and similar questions were raised. Briefly the facts are: Decedent had a checking account at date of death. On that date the depositary was the holder of unsecured notes, one upon demand and one payable at a date subsequent to death. The decedent was indebted to the United States Shipping Board in a large sum. His total unpaid obligations were far in excess of assets. The United States contended it had a preference pursuant to Section 3466, Revised Statutes, over the alleged lien of the bank. The bank refused to pay over, although the administrator had listed the entire checking account as an asset. The court held that the bank's notes came due at decedent's death and that the law of New York gave it the right of set-off. Counsel for the United States Shipping Board conceded that the preferential right did not apply but then contended that the bank was estopped to take the set-off because of crediting interest after the death of decedent. The court held the burden of proof was on the United States to show the bank had knowledge, what date such knowledge was acquired, or that United States had been prejudiced in any way, and on page 244 stated:

“In the absence of such proof the petitioner as administrator C. T. A. and his predecessor executrix had no greater rights than those conferred by law and commercial usage upon the decedent, *i. e.*, to make due

demand upon the bank for the balance of the checking account, subject, however, to the right of the bank as a creditor to set-off the indebtedness due it upon decedent's notes."

From the foregoing it will be evident that Section 3466, Revised Statutes, has not given appellant a priority which would operate to deprive Winnett of his credits and off-sets but that the priority applies to the property of Summers and that this property, as determined by State law (Summers being an insolvent person), was the net balance of \$6,466.64. The effect of Section 3466 and this priority is to obviate the necessity of Winnett first paying this sum of \$6,466.64 to the administratrix of the Estate of Summers before the appellant would receive it. To recognize any other theory, or the theory of appellant that Section 3466 deprives a debtor of the right of set-off, would render business transactions chaotic. No person could deal with a federal taxpayer without first assuring himself that all federal taxes were constantly paid and that such taxpayer was not then nor later likely to be involved in tax litigation or, failing to do this, be at the mercy of the appellant. Such a theory of business transactions carried to an ultimate conclusion would result in the anomalous situation of two persons running a mutual open and current account, with cross-transactions evidencing merchandise returned perhaps or cash payments made, and if one party became insolvent, the other party would lose all of the credits to which he was entitled because of the governmental priority, and if this were so, even the cash payments would be ignored and the total of all items received from the insolvent be collected without the benefit of offsetting deductions. While this is an exaggerated example, in effect there is no difference from the case at bar. Win-

nett had built up credits under an agreement with Summers against his note just as surely as if he had paid cash or furnished merchandise on account. In all equity and good conscience Mr. Winnett should not be penalized by being required to pay his obligation twice simply because for a period of 11 years appellant slept on its rights and failed to adequately proceed against its taxpayer.

Conclusion.

Since we have demonstrated that the credits and off-sets on the part of Winnett were existing, valid and enforceable as to Summers prior to February 16, 1939, and at all times subsequent thereto, the only property or rights to property of Summers to which the appellant's lien attached on February 16, 1939, was the balance of \$6,466.64, and that Section 3466 of the Revised Statutes established no right in appellant which would deprive Winnett of these credits and off-sets, it follows that the judgment should be affirmed.

Los Angeles, California, May 27, 1947.

Respectfully submitted,

MACFARLANE, SCHAEFFER & HAUN and
DEMPSEY, THAYER, DEIBERT & KUMLER,
By RAYMOND V. HAUN,

Attorneys for Appellee.

APPENDIX.

CALIFORNIA CODE OF CIVIL PROCEDURE:

SECTION 437. (CONTENTS OF ANSWER: DENIALS AND STATEMENT OF NEW MATTER.)

The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.
2. A statement of any new matter constituting a defense or counterclaim.

Except in justices' courts of Class B, if the complaint be verified, the denial of the allegations controverted must be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

SECTION 438. (WHEN COUNTERCLAIM MAY BE SET UP.)

The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; provided, that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for foreclosure of such security; and provided further, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.

Sec. 368. ASSIGNMENT OF THING IN ACTION NOT TO PREJUDICE DEFENSE.

In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.

CALIFORNIA CIVIL CODE:

Sec. 3144. WHEN PERSON DEEMED INDORSER.

A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Sec. 3202. RIGHT OF PARTY WHO DISCHARGED INSTRUMENT.

Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except—

(1) Where it is payable to the order of a third person, and has been paid by the drawer; and

(2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.



= 2456

No. 11,496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY CAVASSA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,
Post Office Building, San Francisco 1, California

Attorneys for Appellee.

LEONARD D. HARDY,

Attorney, Federal Security Agency,
Of Counsel.

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MAY 1 - 1947

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IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

HARRY CAVASSA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF FACT.

This is an appeal from a judgment of conviction of the United States Court for the Northern District of California, Southern Division, for violation of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. 301, et seq. In each of the six counts of the information (R. 2-20) it is alleged that certain articles of drug were shipped in interstate commerce to San Francisco, California and subsequently were sold by the original consignee to the appellant who owns and operates the Peninsula Drug Company in San Francisco; that subsequently, while the drugs were being held for sale, the appellant did certain acts which

resulted in the drugs being misbranded within the meaning of Section 352(f), Title 21, U.S.C., and that the doing of such acts with respect to the articles of drug constituted a violation of Section 331(k), Title 21, U.S.C.

It was alleged in Counts I, II, V and VI of the information that although the articles of drug bore no directions for use as required by Sec. 352(f)(1), Title 21 U.S.C., they were lawfully shipped in interstate commerce since they were exempt from the provisions of that section by certain regulations promulgated under authority granted therein, in that the drugs were labeled in part "Caution: To be Used Only By or on Prescription of a Physician." (21 CFR CUM. SUPP. Sec. 2.106(b)(3).) It was also charged in Counts I, II, V, and VI of the information that the appellant caused this exemption to expire, under the terms of the regulation which by it was created, by disposing of the articles of drug other than to physicians or under labels bearing directions for use as specified in prescriptions of physicians; that having caused the exemption to Sec. 352(f)(1), Title 21 U.S. C. to expire, the articles of drug were thereby misbranded, within the meaning of said section, inasmuch as their labeling failed to bear adequate directions for use.

In Count III, the appellant was charged with misbranding an article of drug, within the meaning of Section 352(f)(1) and (2), in that he caused said drug to be removed from its original container and

repacked in an envelope without a physician's prescription therefor and without a label bearing directions for use specified in a prescription of a physician, and without the label containing adequate warning against use in those pathological conditions and by children where its use may be dangerous to health, or against unsafe dosage. The envelope containing the drug bore the single word, "Seconal."

Count IV charged the same offense as Count III, it being alleged that the appellant misbranded an article of drug, seconal sodium, by removing a quantity of said drug from its immediate container and placing it in an *unlabeled* vial. No direction for use appeared on the label of the drug, as repacked, and there was no marking as to unsafe dosage, or against use in those pathological conditions or by children where its use might be dangerous to health.

The trial was before the Court without a jury. The acts of misbranding were stipulated to and no issues of fact were involved. The appellee submitted evidence tending to establish that the articles of drug in question were habit-forming and could be dangerous to health when used indiscriminately by a layman, and that it was in the interest of the people and for their protection that such drugs be used only by physicians or under their direction. The appellant testified to certain facts for the purpose of establishing that the drugs, when misbranded, were no longer in the original package in which they were shipped in interstate commerce and that they were commingled with

the general mass of property in the State of California.

At the conclusion of the trial, the Court found the defendant guilty of all six counts and fined him Two Hundred Dollars (\$200.00) on each count, a total of Twelve Hundred Dollars (\$1200.00.)

RELEVANT STATUTORY AND REGULATORY PROVISIONS.

The following sections of Title 21 U.S.C. and Regulations promulgated thereunder are pertinent to this case:

Sec. 331. The following acts and the causing thereof are hereby prohibited:

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

Sec. 333:

(a) Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1000 or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or

a fine of not more than \$10,000, or both such imprisonment and fine.

Sec. 352:

A drug or device shall be deemed to be misbranded—(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users; *Provided* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement.

The pertinent part of the regulation (21 CFR CUM. SUPP. S. 2.106) promulgated under the proviso of Sec. 352 is as follows:

(b) A shipment or other delivery of a drug or device shall be exempt from compliance with the requirements of clause (1) of section 502(f) of the Act [21 U.S.C. 352(f)] if—

(3) the label of such drug or device bears the statement “Caution: To be used only by or on the prescription of a”, or “Caution: To be used only by a”, the blank to be filled in by the word “Physician”, “Dentist”, or “Veterinarian”, or any combination of two or all of such words, as the case may be;

Such exemption shall remain valid until all of such shipment or delivery is used by physicians, dentists, or veterinarians licensed by law to administer or apply such drug or device, or is dispensed upon, and under labels bearing the directions for use specified in, prescriptions of such physicians, dentists, or veterinarians. But if such shipment or delivery, or any part thereof, is otherwise disposed of as a drug or device, such exemption shall thereupon expire. The causing by any person of such an exemption so to expire shall be considered to be an act of misbranding for which such person shall be liable unless, prior to such disposition, such drug or device is re-labeled to comply with clause (1) of section 502(f) of the Act [21 U.S.C. 352(f)]. [Effective October 7, 1941 to October 10, 1945.]

ISSUES INVOLVED.

The appellant argues three propositions in support of his contention that the judgment of the District Court should be reversed (appellant's brief, page 6.)

I. The Court erred in holding retail sales made by appellant were in interstate commerce.

II. The Court erred in construing the Federal Food, Drug, and Cosmetic Act, and particularly Section 331(k) of Title 21 of the United States Code as applying to the acts of appellant, because such acts were in intrastate commerce and not in interstate commerce.

III. The Court erred in holding that the Federal Food, Drug, and Cosmetic Act and particularly Section 331(k) of Title 21 of the United States Code, so construed as applying to the intrastate acts of appellant was valid and constitutional and not in violation of the Tenth Amendment to and Article I, Section 8, Paragraph 3 of the Constitution of the United States of America.

The first two points presented by the appellant are apparently grounded on the theory that section 331(k) has reference only to acts done in connection with articles in interstate commerce. The intent and purpose of this subsection, as revealed by the language, is not limited in its application to articles in interstate commerce but extends to the doing of acts with respect to articles *after* they have been shipped in interstate commerce and while being held for sale. Section 331 (b) Title 21 U.S.C., prohibits misbranding *in* interstate commerce. It is the government's position that it is immaterial whether the articles of drug misbranded by the appellant were in interstate commerce or intrastate commerce at the time they were misbranded. If the articles had at one time been shipped in interstate commerce and were subsequently misbranded by the appellant while being held for sale, such acts of misbranding constituted a violation of Sec. 331(k) and the appellant is liable to the penalties set out in Sec. 333, Title 21, U.S.C.

An examination of the records fails to disclose that the Court, in finding the appellant guilty as charged,

held that the acts of misbranding occurred in interstate commerce. There is nothing in the records indicating whether the Court considered this a material element of the appellee's case. The pleadings disclosed that the government did not charge that the acts of the appellant were committed while the articles of drug were in interstate commerce. It was alleged that the drugs were misbranded while being held for sale after shipment in interstate commerce, and that this constituted a violation of Sec. 331(k).

Thus, since the government believes that it is immaterial whether the articles were in interstate commerce or intrastate commerce at the time of the misbranding in order to constitute a violation of Sec. 331(k), and inasmuch as the appellant contends that the drugs were in intrastate commerce when misbranded, the government is willing to concede, for the purpose of this case, that the acts of the appellant, which resulted in the misbranding of the drugs, occurred at a time when the said articles were in intrastate commerce while held for sale and that the acts of sale constituted intrastate commerce.

Thus, the sole problem for consideration is that raised by the third proposition of the appellant.

ARGUMENT.

THE COURT DID NOT ERR IN HOLDING THE FEDERAL FOOD, DRUG, AND COSMETIC ACT AND PARTICULARLY SECTION 331 (k), TITLE 21, U.S.C., AS APPLIED TO THE ACT OF APPELLANT, VALID AND CONSTITUTIONAL AND NOT IN VIOLATION OF ARTICLE I, SECTION 8, PARAGRAPH 3 OF, AND THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellant contends that his acts, which resulted in the misbranding of the articles of drug, were done in intrastate commerce and therefore are not subject to Federal control. The appellee, as previously stated, contends that this factor is immaterial in the present case and concedes, for the purpose of this case, that the articles of drug were held for sale in intrastate commerce, after shipment in interstate commerce, at the time of the commission of the prohibited acts. Thus the issue is narrowed to the often considered problem of the extent of the power granted the legislative branch of the Federal Government in Article I, Section 8, Paragraph 3 of the Constitution of the United States. If the power to regulate commerce among the several States includes the power to control intrastate activities which directly affect commerce between the States, and if the acts of the appellant so affected such commerce, then the Congress of the United States had the power to control those acts of the appellant.

I. THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE EXTENDS TO INTRASTATE ACTS WHICH DIRECTLY AFFECT SUCH COMMERCE.

The power of Congress to regulate interstate commerce is plenary in scope, may be exercised to its utmost extent, and acknowledges no limitations other than that prescribed in the Constitution. *Gibbons v. Ogden*, 9 Wheat. 196; *Second Employer's Liability Cases*, 223 U.S. 1, 47. It is no objection to the exertion of the power that its exercise is attended by the same incidents which attend the exercise of the police power of the States. *United States v. Carolene Products Co.*, 304 U.S. 144, 147; *United States v. Rock Royal Cooperative Inc.*, 307 U.S. 533, and transportation is not the sole test for determining the scope of Congressional authority under the commerce clause. *Chicago & N. W. Ry. Co. v. Bolle*, 284 U.S. 74; *Dehnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 291. The power granted Congress under the commerce clause of the Constitution extends to every instrumentality or agency by which interstate commerce is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *The Minnesota Rate Cases*, 230 U.S. 352, 399. The power extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of those intrastate activities appropriate means to the attainment of a legitimate end, the effective exertion of the granted power to regulate interstate commerce. *United States v.*

Wrightwood Dairy Co., 315 U.S. 110, 119; *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 605-606. The power includes the ability to deal with a host of acts which are not in themselves interstate commerce but, because of their relation to and influence upon interstate commerce, come within the power of Congress. *United States v. Ferger*, 250 U.S. 199, 203; *Weiss v. United States*, 308 U.S. 321, 327. Note *Brooks v. United States*, 267 U.S. 432.

Congress may adopt not only means which are necessary, but those which are convenient, to the exercise of the commerce power, *Seven Cases v. United States*, 239 U.S. 510, 515, and may itself determine the means appropriate for this purpose. *McDermott v. Wisconsin*, 228 U.S. 115. The regulation of commerce among the several States includes the power to enact all appropriate legislation for its protection or advancement, to adopt measures to promote its growth and insure its safety and to foster, protect, control and restrain. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37.

Recent Supreme Court cases have sanctioned federal regulation of some phases of intrastate activities. See for example *Currin v. Wallace*, 306 U.S. 1; *Mulford v. Smith*, 307 U.S. 38; *United States v. Rock Royal Cooperative Inc.*, 307 U.S. 533; *United States v. Darby*, 312 U.S. 100; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110. These cases illustrate that Congress may not only prevent the interstate transportation of a proscribed product but may also stop the initial step toward the transportation, the pro-

duction of goods with the purpose of transporting them. See *United States v. Darby*, 312 U.S. 100, at p. 117. The *Darby* case also points out that Congress may regulate intrastate transactions after transportation has ended, when such transactions are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. To illustrate this point, the Supreme Court at p. 121, cited *McDermott v. Wisconsin*, 228 U.S. 115, saying:

“It [Congress] may prohibit the removal at destination, of labels required by the Pure Food and Drugs Act to be affixed to articles transported in interstate commerce.”

Interstate commerce may be affected by the receipt or sale of products after transportation, *National Labor Relations Board v. Abell*, 97 F. (2d) 951, 955 (C.C.A. 4). Thus, in *National Labor Relations Board v. Levour*, 115 F. (2d) 105, 109 (C.C.A. 1), cert. denied 321 U.S. 682, the Court said:

“It has long been held that a sale involving interstate transportation is not removed from Congressional regulation because that sale itself is intrastate, either before or after the transportation.”

Goods that have been transported in interstate commerce have the benefit of the protection appropriate to interstate commerce though the original packages have been broken and the contents subdivided. *Baldwin v. Seelig*, 294 U.S. 511, 526. The benefit of the protection appropriate to interstate

commerce is broad enough, we submit, to require that goods shipped interstate remain properly labeled, in accordance with federal law, while still in the channels of commerce, whether interstate or intrastate. If the power of Congress is broad enough to require that labels which comply with federal law not be *removed* from goods in intrastate commerce that have used the channels of interstate commerce (*McDermott v. Wisconsin*, 228 U.S. 115), then Congress may likewise penalize *tampering* with such labeling.

II. IN THE ENACTMENT OF SECTION 331(k), TITLE 21, U.S.C. CONGRESS INTENDED TO EXERT ITS CONSTITUTIONAL POWER TO THE FULLEST EXTENT.

That Congress, in enacting Section 331(k), intended to exercise all authority over interstate commerce granted under the Constitution is apparent from an examination of the legislative history of this section. In H. R. Report No. 2139, 75th Congress (2d) Sess. 1938), submitted by the Committee on Interstate and Foreign Commerce to accompany S. 5, which became the Federal Food, Drug, and Cosmetic Act, it was stated, with respect to Sec. 331(k):

“In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment.”

III. CONGRESSIONAL CONTROL OVER INTRASTATE ACTIVITIES THAT AFFECT INTERSTATE COMMERCE EXTENDS TO LABELING OF ARTICLES OF DRUG HELD FOR SALE AFTER SHIPMENT IN INTERSTATE COMMERCE.

Having determined that Congress may control intrastate activities which affect interstate commerce, consideration must be given to whether the misbranding of drugs after shipment in interstate commerce and while being held for sale by the retailer is an intrastate activity which so affects commerce between the several states as to subject it to Congressional control.

Under some statutes the determination as to whether an activity affects interstate commerce is left to the Courts, under some the determination is made by administrative boards or agencies, and under others Congress itself has said that an activity affects the commerce. This was pointed out and illustrated in the *Darby* case at p. 120.

The Court stated:

“In passing on the validity of legislation of the class last mentioned [Congressional determination] the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.”

It is manifest that Congress itself has decided that the *misbranding* of drugs while they are being held for sale after shipment in interstate commerce sufficiently affects interstate commerce as to warrant and require federal regulation of the activity.

The government submits that Congress, in enacting Sec. 331(k), has kept within constitutional bounds. One of the principal purposes of the Federal Food, Drug, and Cosmetic Act is to prevent the use of the facilities of interstate commerce in conveying to and placing before the consumer misbranded articles of food and medicine. *McDermott v. Wisconsin*, 228 U.S. 115, at p. 131 (1913); *United States v. Two Bags * * * Poppy Seeds*, 147 Fed. (2d) 123, 127 (C.C.A. 6, 1945). This purpose could not effectively be accomplished if Sec. 331(k) had been omitted. The absence of this section would have made it relatively simple to render nugatory the misbranding provisions of the Act by simply shipping in interstate commerce properly labeled articles and misbranding them after the transportation had ended. Anticipating resort to such stratagem Congress sought to prevent it by enactment of Section 331(k) which would preserve the integrity of the labeling of an article that had been shipped in interstate commerce until it reached the ultimate consumer. It would be a futile gesture to require that drugs be properly labeled during their interstate journey and not be able to maintain the integrity of the labeling until the drugs reach the hands of the public. The facilities of interstate commerce are equally misused, and the same harm is spread to the people, whether the misbranding takes place before interstate commerce begins or after it ends.

“Any rule * * * which is intended to prevent the flow of commerce from working harm to the

people of the nation, is within the competence of Congress.”

Mulford v. Smith, 307 U.S. 38.

That a liberal and expansive interpretation should be extended to all sections of the Federal Food, Drug, and Cosmetic Act was urged by the Supreme Court in *United States v. Dotterweich*, 320 U.S. 277, which involved the criminal prosecution under said Act of a corporate officer for the acts of the corporation. It was there stated (p. 280):

“The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.”

It was determined in *McDermott v. Wisconsin*, 228 U.S. 115, that Federal authority extended far enough to control the label of goods being offered for sale by a retailer to consumers after shipment in interstate commerce. In that case a Wisconsin statute required that certain types of syrup bear labels prescribed in the statute, and none other. *McDermott*, a retail merchant in that State received in interstate com-

merce a box containing 12 cans of syrup. These cans were placed on the shelves of his establishment, for retail sale. The labeling of the syrup when shipped in interstate commerce complied with the Federal Food and Drugs Act of 1906 but did not comply with the Wisconsin law. In order to meet the requirements of the State law it would have been necessary to remove the labels and substitute new ones. In holding that Wisconsin could not require the removal of such labels, the Court, in speaking of the State statute, said:

“Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think * * * to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate regulations of interstate commerce, to destroy rights arising out of the Federal statute which has been enacted under the constitutional power of Congress over the subject.”

By Sec. 331(k) Congress has sought to protect and foster interstate commerce and prevent the impairment of other provisions of the Federal Food, Drug, and Cosmetic Act. This it may lawfully do. “It is the law that when Congress properly enters the field of its authorized activity it may not only adopt means necessary but, in a like manner, means convenient to the exercise of its power.” *Board of Trade v. Milligan*, 16 Fed. Supp. 859, 861. Aff’d 90 Fed. (2d) 855; Cert. denied 302 U.S. 710 (1937).

In the *McDermott* case the Court held that the article had been shipped in interstate commerce and was therefore subject to federal authority to the extent of prohibiting a state from interfering with its label even after it had reached the shelves of a local retailer, that such interference by the State impinged against one of the lawful means Congress had chosen for the protection of the consumer. Since federal authority can require preservation of labels on articles that have been shipped in interstate commerce notwithstanding attempted state regulation, even where the article has become commingled with the property of the State and rests on the shelves of a local retailer, it follows that federal authority extends to the prosecution and punishment of acts that result in the articles being misbranded under like conditions. This, Congress did by the enactment of Sec. 331(k).

An important Supreme Court pronouncement with respect to the Food and Drugs Act of 1906 appears in the dissenting opinion of Justice Holmes in *Hammer v. Dagenhart*, 247 U.S. 251 (1919). The majority opinion was recently expressly overruled by a unanimous Court in *United States v. Darby*, 312 U.S. 100, where on page 115, the Court referred to "the powerful and now classic dissent of Mr. Justice Holmes." In his dissent in the *Dagenhart* case, Justice Holmes stated on page 279:

"The Pure Food and Drug Act which was sustained in *Hipolite Egg Co. v. United States*, 220 U.S. 45, with the intimation that 'no trade can be carried on between the States to which

it (power of Congress to regulate commerce) does not extend', 57, applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U.S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."

Here Justice Holmes gave recognition to the proposition that in the Food and Drugs Act of 1906 Congress did not confine its regulation of interstate commerce in such merchandise to the period of transportation alone, but properly struck at evils intimately associated with such commerce, though they might arise prior or subsequent to the transportation.

Recently, the United States District Court for the Middle District of Georgia had before it substantially the same question as is raised in the instant case. The defendant there was also charged with violations of Section 331(k), Title 21, U.S.C., and the circumstances under which the violations were alleged to have taken place were similar to those in the present case. The defendant filed a motion to dismiss the information in which he attacked the constitutionality of Section 331(k) and urged that the provisions of the section were not applicable to the conduct charged as violations. The Court in denying the motion filed an opinion which contains a comprehensive analysis

of these two important questions. *United States v. Sullivan*, 67 F. Supp. 192.¹

By the statute here in question Congress has in effect declared that if the facilities of interstate commerce are used for the shipment of goods, no person may thereafter, while the goods are being held for sale, do any act with respect to the goods which misbrands them. The mischief, which the statute seeks to prevent, has a direct effect on interstate commerce. To hold that Congress may not prohibit such acts would permit the facilities of interstate commerce to be used to the detriment of the public, and render nugatory in a wide field, its power to regulate commerce among the several states.

IV. CASES RELIED ON BY APPELLANT ARE NOT IN POINT.

The appellant relies heavily on *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (appellant's brief, p. 19) to sustain his position that the acts which resulted in the misbranding of the articles of drug here involved were so remote from interstate commerce as to be beyond the control of Congress. The Government contends that the two situations are quite distinguishable. In the *Schechter* case the Court held that the constitutional grant of power to Congress to regulate commerce among the several States is not authority for the regulation of wages and hours of

¹This case is now pending on appeal before the Circuit Court of Appeals for the Fifth Circuit.

employment in the strictly intrastate transactions of a local live poultry slaughter house market which does no interstate business; that even though the live poultry was transported in interstate commerce, it was in intrastate commerce when it came into possession of the Schechter company, and the wages and hours of the employees of such company so remotely affected interstate commerce as to be outside the sphere of Congressional authority. The Court said:

“The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendant’s slaughter house markets. It is plain that these requirements are imposed in order to govern the details of defendant’s management of their business.”

The purpose of the Federal Food, Drug and Cosmetic Act is very different. Congress enacted the law with the intent of denying the channels of interstate commerce to food, drugs, devices, and cosmetics which were adulterated or misbranded in a manner to constitute a threat of injury to the consuming public. The protection of the people of the Nation was uppermost in the minds of Congress in adopting this law. As stated in *United States v. Two Bags * * * Poppy Seeds*, 147 F. (2d) 123, 127 (C.C.A. 6):

“From its inception, to its last amendment, The Pure Food and Drug Act was intended to protect the consuming public.”

See also, *United States v. Antikamnia Co.*, 231 U.S. 654, 665.

And if, in order to achieve this legitimate end, Congress deemed it necessary to control certain intrastate activities which, if wrongfully used, could have the effect of nullifying the purpose and the intention of Congress in wielding its power over interstate commerce to prevent the transportation and placing before the public of misbranded and adulterated articles, it cannot be said that such activities so remotely affect interstate commerce as to be beyond Federal control. As was said in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119:

“The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulations of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”

In the *Schechter* case the Supreme Court found that the provisions of the Code were *chiefly* directed at the control of the details of the defendants' management of their intrastate business. In effect the Court determined that this detailed management was so remote in its effect on interstate commerce as to be beyond the scope of the commerce power of Congress. In the present case, the acts of the appellant had such a *direct effect* on the power of Congress to control commerce among the States as to completely nullify the use of that power in preventing the misbranding of

certain articles of drug which had been transported from one State to another.

The appellant also relies heavily on *Walling v. Jacksonville Paper Co.*, 317 U.S. 564. (Appellant's brief, p. 10.) This case involved the Fair Labor Standards Act and is clearly distinguishable from cases under the Federal Food, Drug, and Cosmetic Act, Section 331(k), Title 21 U.S.C. The Fair Labor Standards Act was specifically limited in scope to articles "in commerce". On this point the Court said (p. 570):

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states * * * Moreover, as we stated in *Kirschbaum Co. v. Walling*, [316 U.S. 517], Congress did not exercise in this Act the full scope of the commerce power."

As previously shown in this brief, Congress in enacting the Federal Food, Drug, and Cosmetic Act intended to extend federal control to the farthest reaches commensurate with the power granted by the Constitution in the "commerce clause." The clear wording of section 331(k) discloses that Congress intended to control intrastate activities to the extent of preventing such activities from defeating the avowed purpose of the federal law.

The distinction between *United States v. Phelps Dodge Mercantile Co.*, 157 F. (2d) 453 (C.C.A. 9, 1947) (appellant's brief, p. 18) and the pres-

ent case is so fundamental as to need little discussion. The issues are entirely different. In the *Phelps Dodge* case it was contended that certain articles of food were adulterated while in the original unbroken package. The Court held that in order to seize and condemn an article under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)) it must be alleged and established that the article misbranded or adulterated when introduced into or while in interstate commerce, that alleging and proving an article was adulterated while in the original unbroken package after shipment in interstate commerce did not constitute an allegation that it was adulterated when introduced into or while in interstate commerce, and therefore that the libel did not state facts sufficient to warrant condemnation of the food. In the case under consideration, it is charged that the articles of drug were misbranded *after* shipment in interstate commerce and while being held for sale. It was stipulated by both parties that the drugs had been transported in interstate commerce and that they were subsequently misbranded while being held for sale. This constitutes the offense forbidden under Sec. 331(k) Title 21, U.S.C.

The appellant relies on *Weigle v. Curtice Brothers Co.*, 248 U.S. 285, for the purpose of construing and interpreting section 331(k), Title 21, U.S.C. The Court in that case was not confronted with the misbranding of articles held for sale after shipment in interstate commerce since the Federal Food and Drugs

Act of 1906, which was in effect in 1919 when the opinion was rendered, contained no such provision as Section 331(k). The Court considered only the validity of a Wisconsin State statute which was applicable in a field which the Federal Food and Drugs Act of 1906 did not touch, that is, the retail sales of articles of food after interstate shipment had ceased and the articles had been removed from the original packages. The Court did not consider whether these retail sales were intrastate activities which directly affected interstate commerce. The Act of 1906 clearly did not apply to such activities and the question was not raised. More recently, as previously shown in this brief, the Supreme Court, on numerous occasions, has held that the power of Congress over commerce among the states extends to intrastate activities which have a *direct effect* on interstate commerce. The "recognized line of distinction between domestic and interstate commerce" has not greatly changed since the *Weigle* decision, but the power granted Congress under Article 1, Section 8, paragraph 3 of the Constitution has been held not to be limited by "interstate commerce" but to extend to all activities directly affecting interstate commerce.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the judgment of the District Court should be sustained.

Dated, San Francisco, California,

April 23, 1947.

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

Attorneys for Appellee.

LEONARD D. HARDY,

Attorney, Federal Security Agency,

Of Counsel.

No. 11,496

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

LARRY CAVASSA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

J. A. PARDINI,

ELDA GRANELLI,

F. CAMPAGNOLI,

550 Montgomery Street, San Francisco 11, California,

Attorneys for Appellant.

FILED

MAY 29 1947

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It is true that the constitutional power of Congress to regulate interstate commerce extends to acts which directly affect such commerce, but appellant contends that his acts have no such effect, direct or indirect, and the Federal Food, Drug and Cosmetic Act and particularly Section 331(k) of Title 21 of the United States Code, makes no reference to such acts	5
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No. 11,496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY CAVASSA,

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vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

RESTATEMENT OF QUESTIONS INVOLVED.

The appellant argued three major propositions in his opening brief, in support of his contention that the judgment of the lower Court should be reversed. The first two propositions are:

I. The Court erred in holding the retail sales made by appellant were in interstate commerce.

II. The Court erred in construing the Federal Food, Drug and Cosmetic Act, and particularly Section 331 (k) of Title 21 of the United States Code as applying to the acts of appellant, because such acts were in intrastate commerce and not in interstate commerce.

The appellee, in its brief (Appellee's Brief, p. 8), concedes that the acts of the appellant herein occurred at a time when the drugs in question were in intrastate commerce, while held for sale and that the acts of sale constituted intrastate commerce.

The first two points presented by appellant are grounded on the theory that Section 331 (k) *can* have reference only to acts done in connection with articles in interstate commerce. The intent and purpose of a section of an act does not determine its constitutionality.

The appellee contends that it is immaterial whether the articles of drug involved herein were in interstate commerce or intrastate commerce. This contention is not acceded to by the appellant. Appellant considers it to be of great and vital importance in this matter.

The appellee centers its argument around the third proposition raised in appellant's brief, namely:

III. The Court erred in holding that the Federal Food, Drug and Cosmetic Act, and particularly Section 331 (k) of Title 21 of the United States code so construed as applying to the intrastate acts of appellant was valid and constitutional and not in violation of the Tenth Amendment to Article I, Section 8, Paragraph 3 of the Constitution of the United States of America.

ARGUMENT.

The Federal Government is a government of delegated powers. Article I, Section 8, Paragraph 3 of the Constitution of the United States gives Congress the power

“to regulate commerce with foreign nations and among the several states.”

This is the foundation stone upon which the Federal Food, Drug and Cosmetic Act is laid, and it is by this section, and the decisions construing it, that the act, and particularly Section 331 (k), as applied in this case, must be judged.

There are perhaps many phases of our modern life which would be better regulated by a central government than by various local governments. But when the government of the United States was established, a dual system was decided upon, and it is under such a system that we live. The mere fact that Congress believes that the sale of drugs should be regulated by the Federal government does not in and of itself make such a regulation constitutional. The validity or invalidity of an act, or a subsection thereof, is to be tested by the decisions of the Courts and the precedents set down therein.

The framers of the Constitution, in drawing up the Commerce Clause, used words without any veiled or obscure signification. In *Gibbons v. Ogden* (9 Wheat. 1, 188, 6 L. Ed. 23, 68) :

“As men whose intentions require no concealment generally employ the words which most directly

and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said."

Those who framed the Constitution had no intention of subjecting thousands of small local enterprises to national direction. If the possibility of this had been declared, the Constitution could not have been adopted. So construed, the power to regulate interstate commerce brings within the ambit of federal control most, if not all, activities of the nation, subjects states to the will of Congress, and permits disruption of our federated system.

Kidd v. Pearson (1888), 128 U. S. 1, 20, 21, 32 L. Ed. 346, 350, 9 S. Ct. 6, lucidly pointed out the necessary result of this subversive doctrine, showed how it had long been authoritatively rejected, and demonstrated its utter absurdity. The doctrine approved in the *Pearson* case has been often applied, see *United States v. C. E. Knight Co.* (1895), 156 U. S. 1, 16, 39 L. Ed. 325, 330, 15 S. Ct. 249; *Oliver Iron Min. Co. v. Lord* (1923), 262 U. S. 172, 178, 67 L. Ed. 929, 935, 43 S. Ct. 526; *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U. S. 495, 545-55, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; *Carter v. Carter Coal Co.* (1936), 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

These cases illustrate the basic quality of the point herein involved. The attempted curtailment of the

independence reserved to the states, and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system.

I.

IT IS TRUE THAT THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE EXTENDS TO ACTS WHICH DIRECTLY AFFECT SUCH COMMERCE, BUT APPELLANT CONTENDS THAT HIS ACTS HAVE NO SUCH EFFECT, DIRECT OR INDIRECT, AND THE FEDERAL FOOD, DRUG AND COSMETIC ACT AND PARTICULARLY SECTION 331(k) OF TITLE 21 OF THE UNITED STATES CODE, MAKES NO REFERENCE TO SUCH ACTS.

The Federal Food, Drug and Cosmetic Act (Public Law, No. 717, Seventy-fifth Congress, Chapter 675, Third Session, S. 5) sets forth, that it is,

“An act to *prohibit the movement in interstate commerce* of adulterated and misbranded foods, drugs, devices and cosmetics and for other purposes”.

21 U.S.C.A. Section 331 (k) prohibits,

“The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded”.

Nowhere in these provisions is there mention of the control of acts which might “directly affect” interstate commerce. If Congress intended the act to be

so applied, why did it not resolve all possible doubts by the insertion of two simple words? In the absence of such declaration by Congress, the conclusion is inescapable that Congress had no intention that the Federal Food, Drug and Cosmetic Act should be so applied.

Assuming for the sake of argument that, regardless of the expression by Congress in the Act itself, the implied power to control acts, which "directly affect" interstate commerce, exists. We are then faced with the problem of deciding whether the acts of appellant so affect said commerce.

It is important to clearly visualize the status of the appellant; this man whose acts, according to the appellee have a "direct affect" upon interstate commerce. He is not a manufacturer whose products are shipped in interstate commerce, he is not a seller of goods to be shipped in interstate commerce, he is not even an original consignee of goods shipped in interstate commerce. He is a retail druggist who purchases small lots of drugs and other items from wholesale houses within the City and County of San Francisco, and resells these items to purchasers who come into his store off the street. If this, appellant's acts, have any effect, direct or indirect on interstate commerce, then there is no activity which the Federal Government could not reach under the guise of this power. The thought of appellant's acts affecting interstate commerce is one which at first glance is filled with humor were its implications not fraught with such grave danger to the very foundation of our

system of government. If appellant's acts in this case can be regulated by the Federal Government, then there is no activity which could not be so regulated merely because at sometime in the course of manufacture, production, shipment or sale, interstate commerce was involved. As a result, Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?

The Court in the case of *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U. S. 495, 546, 548-550, 79 L. ed. 1570, 1588-1591, 55 S. Ct. 837, 97 A. L. R. 947, said:

“* * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government * * * The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. * * * If the federal government may determine the wages and hours of employees in the internal commerce of a State * * * it would seem that a similar control might be exerted over other elements of cost, also affect-

ing prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. * * * But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * *

The appellee in its brief attempts to distinguish the *Schechter* case from the facts of the case at issue, (Appellee's Brief, p. 20), on the ground that the provisions of the Code in the *Schechter* case were chiefly directed at the control of the details of the defendant's management of their intrastate business. It is difficult to see how the control of the sale of drugs by a druggist can be any less a control of the details of intrastate business than the control attempted over the wages and hours of employees in the *Schechter* case. Both appellant and the defendant in the *Schechter* case are retailers of items, that at one time in the course of their existence, were in interstate commerce, and in neither case can any direct effect on interstate commerce be discerned.

In the case of *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. ed. 893, the Court said:

"The scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effect-

ually obliterate the distinction between what is national and what is local and create a completely centralized government.”

It is difficult to perceive wherein the alleged “direct effect” on interstate commerce is present in the wholly intrastate acts of the appellant in this case, and it is submitted that there is no basis in law or reason for applying different rules to the *Schechter* case and the case at issue.

II.

IT IS FOR THE COURTS TO DETERMINE WHETHER CONGRESS HAS ACTED WITHIN THE POWERS GRANTED IT IN THE CONSTITUTION OR HAS OVERREACHED THOSE POWERS.

The Legislative history of an act of Congress is helpful in determining the intent of Congress in passing the legislation in question, but the expression of various committees is not a determination of the constitutionality of Section 331 (k). Whatever its desires or beliefs, Congress must act within its granted powers, or have the Constitution properly amended so as to allow the passage of legislation it deems advisable. The Constitution should not be amended by legislative fiat, and such is the fact if the appellee's contention is followed.

III.

CONGRESSIONAL CONTROL OVER INTRASTATE ACTIVITIES THAT AFFECT INTERSTATE COMMERCE DOES NOT EXTEND TO APPELLANT'S ACTS IN THIS CASE SINCE HIS ACTS CAN, BY NO REASONABLE STRETCH OF THE IMAGINATION, AFFECT INTERSTATE COMMERCE IN THE MANNER INTENDED BY THE COURTS IN THE USE OF THE PHRASE.

As was said by the Court in *United States v. E. C. Knight Co.*, 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 S. Ct. 247:

“Slight reflection will show that if the national power extends to all productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.”

In *U. S. v. Darby*, 312 U. S. 100, the Court, in its decision, said:

“But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a *substantial* effect on interstate commerce. * * * A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. * * * But long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to Regulate interstate commerce extends to the regulation through legislature action of activities intrastate which have a *substantial* effect on the commerce * * *” (Italics ours.)

It is clear that the Court did not intend to hold in the *Darby* case that any effect on interstate commerce,

no matter how indirect, would lend itself to regulation by Congress. The Court speaks of "substantial effects". The words "affecting interstate commerce," without the qualifying words "substantial" and "direct", are misconceptions that imply a notion not found in the cases. It would be difficult to find any activity today which does not in some remote way touch interstate commerce. Certainly there is a limit to the elasticity of the commerce clause of the Constitution.

Appellee expresses great concern over the protection of the consuming public and seems to assume that the Federal government is the only agency which can possibly render such protection. The state and its protective agency is ignored. The State of California has an act entitled The California Pure Drugs Act, Chapter 730, Statutes 1939, as amended in 1941 and 1943, and a staff for the enforcement of this act. This legislation is solely for the protection of the consuming public in the State of California, and its agents are ever watchful for violations. This dispels the insinuation that unless Section 331 (k) of the Federal Food, Drug and Cosmetic Act is applied or contended, the consuming public is without protection from this type of violation.

The Appellee's argument has a basic fallacy. The line of reasoning seems to be that because Congress passes legislation which it believes beneficial and necessary, the Court has no other problem before it. That is not the system of checks and balances set up in our Constitution.

As the Court said in *Schechter Poultry Corp. v. United States*, 295 U. S. 495:

“It is not the province of the Court to consider the economic advantages or disadvantages of * * * a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the Federal Government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences and conspiracies to restrain and monopolize it. But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself established, between commerce ‘among the several States’ and the internal concerns of a State.”

These pronouncements illustrate that the Courts are very conscious of the distinction between intrastate and interstate commerce and that intrastate activities can be regulated by Congress only when they directly and substantially affect interstate commerce.

It is difficult to see how the acts of this appellant directly or substantially affect interstate commerce at all.

IV.

CASES RELIED ON BY APPELLEE ARE NOT IN POINT.

Appellee relies on such cases as *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, which arose

under the Agricultural Marketing Agreement Act of 1937, regulating the price of intrastate milk in competition with milk shipped in interstate commerce. The Court there found that there was interference with interstate commerce. The Court held that the intrastate activities substantially interfered with the exercise of the power to control interstate commerce granted Congress. The *Wrightwood* case involved the competition of a local product with that of a like commodity moving in interstate commerce. In the case at issue, appellant's acts and the commodities he sells do not compete with products moving in interstate commerce. They have no effect on interstate commerce whatever. A situation similar to the *Wrightwood* case arises in the case of *U. S. v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 83 L. ed. 1446, 59 S. Ct. 993, also cited in the appellee's brief. This case concerned milk dealers who handled milk moving in interstate commerce, which on its facts is a very different situation from that which we have here.

In such cases as *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *N. L. R. B. v. Levour*, 115 F. (2d) 105 (C. C. A. 1); *N. L. R. B. v. Abell*, 97 F. (2d) 951 (C. C. A. 4), which are all cited by appellee, we have cases which involve the National Labor Relations Act and, manufacturers which, to a greater or lesser extent, were all manufacturing products which were shipped in interstate commerce, and situations in which a labor dispute would affect interstate commerce. Appellant is not a producer. He does not sell in interstate com-

merce. His acts cannot be compared to a strike in a manufacturing plant which supplies the entire nation with a certain product. The effect on interstate commerce in such a situation is obvious.

In the case of *McDermott v. Wisconsin*, 228 U. S. 115, upon which appellee relies quite heavily, we have a case arising under the 1906 Federal Food and Drugs Act. McDermott was the original consignee of the articles in that case, he having received them in interstate commerce, and not having sold them. The act specified control over goods "unloaded, unsold or in the original package". Appellee now wants us to go further. Appellant is not the original consignee, he is not selling in the original package. He purchased from an original consignee who had broken the original package and who sold many other and diverse items produced both within and without the state. The cases are distinguishable.

Appellee dismisses the case of *United States v. Phelps Dodge Mercantile Co.*, 157 F. (2d) 453 (C.C.A. 9, 1947) as one which needs little discussion. It is a case in point insofar as it is a pronouncement of the Court on the Federal Food, Drug, and Cosmetic Act and on a question of interstate commerce. The libel section of the Act, Section 304 (a), 21 U. S. C. A., Section 334 (a), provides that any adulterated or misbranded food, drug, device or cosmetic, may be proceeded against "while in interstate commerce, or at any time thereafter". The Court held that since the interstate journey of the food in question had

ended, the Federal Government had no jurisdiction to proceed with a libel action.

The Court said "Thus it appeared that the adulteration of the food occurred after it ended its interstate journey and came to rest at appellee's warehouse". The Court then cites such cases as *American Steel & Wire Co. v. Speed*, 192 U. S. 500; *Sonneborn v. Cureton*, 262 U. S. 506; *Louis K. Liggett Co. v. Lee*, 288 U. S. 517; *Walling v. Jackson Paper Co.*, 317 U. S. 564, all cases in which the Court has laid down the line of demarcation between interstate commerce and intrastate commerce, between Federal and State power. The fact that the section of the act contained the words "or at any time thereafter" did not alter this basic distinction. Similarly, the fact that the section involved in the case at issue, section 331 (k), contains the words "while held for sale after shipment in interstate commerce" does not increase the power of the Federal Government over articles whose interstate journey has ended, and whose sale can in no way, directly or substantially, affect interstate commerce.

The *Phelps Dodge* case is also of interest in that it demonstrates that the Court does not follow administrative interpretations of an act when those interpretations are erroneous.

The appellee mentions the case of *United States v. Sullivan*, 67 F. Supp. 192, decided in the United States District Court for the Middle District of Georgia, now pending on appeal before the Circuit Court of Appeals for the Fifth Circuit. This case is, of course,

similar to the case at issue, and in the opinion of the appellant reaches the same erroneous conclusion as to the power of the Federal Government.

In the recent case of *United States of America v. William Ray Olsen*, No. 11,407, decided May 15, 1947, in the United States Circuit Court of Appeals for the Ninth Circuit, this Court reversed a decree of the District Court of the United States for the District of Oregon. This case, like the *Phelps-Dodge* case, involved Section 304 of the Federal Food, Drug and Cosmetic Act. The Court said:

“* * * When the article was introduced into, and while in interstate commerce, its labeling was false and misleading. Hence the article was misbranded within the meaning of the act, when introduced into and while in interstate commerce.”

This is a situation different from the case at issue. In the *Olsen* case (*supra*), the government is proceeding against an item which violated the act when introduced into and while in interstate commerce. This is in accord with the *Phelps-Dodge* decision. In the case at issue, the government is attempting to reach intrastate acts merely because at one time interstate commerce was involved and despite the fact that there were no violations whatsoever during that period. Intrastate acts may be regulated if they directly or substantially affect interstate commerce. It is submitted that no such direct or substantial effect is present in this case. Any declaration in the act itself, which attempts to so extend the jurisdiction of the

Federal Government, is valid only if such direct and substantial effects are present.

CONCLUSION.

The appellant respectfully submits that since the acts of appellant were acts conceded to be in intra-state commerce, since the Federal Food, Drug and Cosmetic Act makes no attempt to cover acts affecting interstate commerce, and, in view of the fact that in any event it is utterly impossible to see how the appellant's acts could in any way, directly or substantially, affect interstate commerce, the judgment of the District Court should be reversed.

Dated, San Francisco, California,
May 29, 1947.

J. A. PARDINI,
ELDA GRANELLI,
F. CAMPAGNOLI,
Attorneys for Appellant.

(NOTE): Since the writing of this brief, the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court of the United States for the Middle District of Georgia in the case of *Sullivan v. United States of America*, No. 11,774, decided May 12, 1947. The appellee relied on the District Court decision in its brief (Appellee's

Brief, p. 19). To date it is the only pronouncement of a Circuit Court on this point. The appellant submits that the facts of the case at issue and the *Sullivan* case are the same, and respectfully urges a similar decision by this Court.

For the convenience of the Court, the decision in the *Sullivan* case is printed *in toto* as an appendix to this brief.

(Appendix Follows.)

Appendix.



Appendix

*In the United States Circuit Court of Appeals
for the Fifth Circuit*

No. 11,774

**JORDAN JAMES SULLIVAN, TRADING AS
SULLIVAN'S PHARMACY,**

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the District Court of the United States
for Middle District of Georgia.**

(May 12, 1947.)

**Before SIBLEY, McCORD, and LEE,
Circuit Judges.**

SIBLEY, Circuit Judge: Sullivan, a local retail merchant in Columbus, Georgia, was convicted under the Federal Food, Drug and Cosmetics Act, 52 Stats. 1040, Sect. 301, (c) and (k), 21 U.S.C.A. §331(c) and (k), for selling to two federal inspectors two lots of twelve tablets each of sulfathiazole taken from a bottle on the shelves of his drug store which had con-

tained 1,000 tablets. The facts as alleged in the information and stipulated or proven on the trial are these: Between Nov. 25, 1943, and March 15, 1944, Abbott Laboratories, doing business in North Chicago, Illinois, shipped in interstate commerce to Abbott Laboratories, at Atlanta, Georgia, a number of boxes containing bottles of drugs, one of them being this bottle of 1,000 tablets of sulfathiazole, which was duly labeled as such, with a caution that they are to be used only by or on the prescription of a physician, and with the name and Chicago address of Abbott Laboratories. This bottle so labeled was on Sept. 29, 1944, in Atlanta sold to Sullivan, and by him transferred in intrastate commerce to his pharmacy in Columbus, and placed on his shelves for retail sales to customers. On Dec. 13, 1944, the two lots of twelve tablets each were taken from the bottle, placed in pasteboard pill boxes, with only the word sulfathiazole (slightly misspelled) on them, and sold to the federal inspectors. The label on the bottle was not defaced or changed, and the bottle was seen and afterwards taken in charge by the inspectors. A motion to dismiss the information as not charging a federal crime, and one for a judgment of acquittal because none was proved, were overruled and this appeal taken.

The general constitutionality of the federal act under the commerce clause of the Constitution is admitted. The contentions are that the Act is not intended to operate on retail sales over the counter after interstate commerce has ended, by one who was not the importer; that the language is not clear enough to

make criminals of such sellers; and that if construed to apply to them the Act is to that extent beyond the power of Congress.

It will be noted that the only interstate commerce here involved is the transportation of bottles of drugs in boxes from Chicago to Atlanta at least nine months before the sales here in question. The boxes came to rest in Atlanta and were opened by the importer, Abbott Laboratories, and the bottles were put in their stock of drugs in Atlanta for sale. Over six months thereafter Sullivan bought one bottle, which is conceded to have been duly labeled, and put it into his stock of drugs at Columbus for retail sales, where the bottle stayed for three more months. If the criminal provisions relied on apply here, they apply to all intrastate sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act. We are not able to conclude that the Act is to be so construed as to bring within these penal provisions most of the sales in all drug stores, beauty parlors, barber shops and retail grocery stores in the United States.

The general purpose of the Act is declared in its simple title: "An Act to prohibit the movement in interstate commerce of adulterated and misbranded foods, drugs, devices and cosmetics, and for other purposes." Section 301(c) prohibits (under penalty by Section 303), "The receipt in interstate commerce of

any food, drug, device or cosmetic that is adulterated or misbranded, and the proffered delivery thereof for pay or otherwise". Sullivan clearly did not receive in interstate commerce any misbranded drug, nor did he proffer delivery of any in interstate commerce. A moderately strict construction of this penal provision would confine it to shippers and to importers in interstate commerce, and proffers of sale by the latter. Sullivan was a party to intrastate sales only. Moreover since this bottle was at all times duly labeled and not misbranded, no one violated this provision by receiving or proffering delivery of it.

Section 301(k) prohibits "The alteration, mutilation, destruction, obliteration or removal of the whole or any part of the labeling of, or the doing of any other Act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." The labeling here was not removed or mutilated; but an act was done with respect to the drug, to-wit, the removal of some of it from the labeled bottle and the placing of it in a box not sufficiently labeled under the Act, after shipment in interstate commerce and while the drug was held for sale, so that this portion of the drug became misbranded. Therefore in their broadest possible sense these words may include what happened. But we are of opinion that they ought not to be taken so broadly, but held to apply only to the holding for the first sale by the importer after interstate shipment. Since importa-

tion by merchants of all merchandise is for the very purpose of sale, the importation, as has always been held, remains incomplete till its purpose is thus realized. *Brown v. Maryland*, 12 Wheat. 419. The words of Section (k), "held for sale after shipment in interstate commerce", naturally refer to this first sale by the merchant importer. It was this sale which was involved in *McDermott v. Wisconsin*, 228 U. S. 115, and in *Baldwin v. Seelig*, 294 U. S. 511, much relied on by the government. We do not doubt, however, that the United States can prohibit the destruction of the labeling under which interstate commerce occurred, by anyone at any time, in order to preserve the evidence of what was done during the interstate movement, as is fairly held in the *McDermott* case cited; but here this evidence was never meddled with, but went unaltered into the hands of the inspectors, and it shows a correct labeling. These main provisions of subsection (k) were fully complied with. The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the federal Act in this way. If the "holding for sale" is held to refer to all would-be sellers, no matter where or when or in what quantities, of all foods and drugs and cosmetics which at

some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, to-wit, the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State.

And the State of Georgia has not neglected her duty. Title 42 of the Georgia Code deals with the subject of selling and labeling foods, drugs and toilet articles, with several cooperative references to the federal laws and regulations, as in Sect. 42-110, 42-111; and 42-802, 42-806. Sections 42-701 and ff. regulate the dispensing of poisons, this legislation dating back to the year 1876. Sections 42-101 and ff. embody comprehensive laws on the subject of foods and drugs passed in 1906 and 1908. The Uniform Narcotic Drugs Act of 1935 is found in Sections 42-801 and ff. The Dangerous Drug Act of 1939 is in Sections 42-708 and ff. The last expressly covers the derivatives and compounds of sulfanilimide, and the label on the bottle here in controversy indicates that sulfathiazole is such, so that this Georgia Act applies to these sales, and Sullivan appears to have violated it here. It would seem the federal inspectors should have reported them to the Georgia inspectors. It is probable that other States have similar laws, reducing the need for Congress to interfere thus in intrastate commerce, if it has the power.

In passing this Act Congress in its title indicated that its main and direct concern was with "the movement in interstate commerce". Until that movement is complete and the importer has sold his original packages the State cannot interfere. Congress regulated what the Constitution directly authorizes. There is no indication of any intention to regulate intrastate commerce because of any burdensome effect on interstate commerce. The talismanic expression "Affecting interstate commerce" is not used, as in the National Labor Relations Act passed shortly before. In interpreting and applying those words in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, the Court was careful to point out the rule of construction of statutes that a construction will not be adopted that is of doubtful constitutionality, in this very matter of federal intrusion upon the domain of the States, saying at page 30: "We have repeatedly held that as between two possible constructions of a statute by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same (citing numerous cases.)"¹ Also in *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, we read: "The construction of Sect. 5 urged by the Commission would give the federal agency control over myriads of local businesses in matters heretofore traditionally left to custom or local law. . . . An inroad upon local conditions and local standards of such

¹*Schechter Poultry Corporation v. United States*, 295 U. S. 495, though not exactly in point, is enough to raise serious doubt in this case.

farreaching import as involved here ought to await a clearer mandate from Congress.” Much more ought unambiguous and clear words to be required when statutes creating criminal offenses are for construction. *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Harris*, 177 U. S. 305; *Kraus v. United States*, 327 U. S. 614.

The purpose of this Act being to regulate “movement in interstate commerce” of foods, drugs and cosmetics, and the general purpose of subsection (k) being to prohibit mutilation of the labeling on the packages which so moved, we do not find the proposed application of the *ejusdem generis* words “Any other act” plain enough to make criminals of retail grocers and druggists who did not import but who break and sell intrastate from the imported packages without mutilating the labeling.² We thus find it unnecessary to determine the constitutionality of the federal regulation of intrastate sales as here contended for, by denying that doubtful construction.

The judgment is reversed with direction to acquit the defendant below.

JUDGMENT REVERSED.

²*Armour and Co. v. Dakota*, 240 U. S. 510, and *Weigle v. Curtice Bros. Co.*, 248 U. S. 285, held that retail sales from broken interstate packages were not governed by the federal Food and Drugs Act then in force but by the State law, partly for constitutional reasons; but the present Act differs enough to make these decisions probably not controlling here. In *United States v. Dotterweich*, 320 U. S. 277, the shipment of the repacked drugs was in interstate commerce and was prosecuted under Sect. 301(a), and the construction of (k) was not involved at all.

No. 11,497

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN W. PARKER and WELLS FARGO BANK
& UNION TRUST CO., as Executors of
the Last Will and Testament of J. M.
MANNON, JR., Deceased,

Petitioners,

v.

JOSEPH D. NUNAN, JR.,
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONERS

A. CRAWFORD GREENE
HENRY D. COSTIGAN
ROBERT L. LIPMAN
STANLEY MORRISON
JOHN WICKSON THOMAS
1500 Balfour Building
San Francisco 4, California
Attorneys for Petitioners

May 15, 1947.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN W. PARKER and WELLS FARGO BANK
& UNION TRUST CO., as Executors of
the Last Will and Testament of J. M.
MANNON, JR., Deceased,

Petitioners,

v.

JOSEPH D. NUNAN, JR.,
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONERS

Respondent's brief is notable in two particulars—(first) it shows that the Commissioner has now substantially abandoned the grounds upon which the Tax Court places its decision and (second) it makes no serious attempt to answer our opening brief. It seems plain that the Commissioner finds it not a little difficult to sustain his contention that the trust income is taxable to the decedent.

Reply to Respondent's Contention That Income From Children's Trusts Was Required to Be Used for Their Support.

The Tax Court held,—as we contended and as the Commissioner himself tacitly conceded before that court,—that the income from the three trusts for the Mannon children was, during the minority of the children, Mrs. Mannon's and not that of the children. On this point the Tax Court said:

“Petitioners urge and respondent apparently agrees that the children during the minority had no interest whatsoever in the income of the three trusts set up for their benefit. We agree also. The trust instruments and property settlement agreement under which the trusts were set up must, of course, be read together. The property settlement agreement specifies that the trusts were to provide ‘for the security’ of the wife and that they were accepted by her as satisfactory for ‘her’ support and maintenance, without mention of the children, emphasizing the lack of legal interest the children had in any of the trust income during their minority.” (R. 169)

In other words, the Tax Court made no distinction between the income from Mrs. Mannon's trust and that from the three children's trusts. It was all Mrs. Mannon's. Upon that basis the Tax Court decided that the income from the children's trusts was taxable to the decedent because, so the Tax Court thought, the property agreement

“surely gave the decedent the *legal** right to *require* the wife first to avail *herself* of the trust income

*All emphasis throughout this brief, unless otherwise expressly noted, is ours.

before *she* could successfully complain that *her* marital rights of support had been violated." (R. 172)

The Commissioner now contends, however, that the income from the children's trusts is to be differentiated from that of Mrs. Mannon's own trust and that the income of the children's trusts is to be taxed to the decedent because, so it is said, the trusts require Mrs. Mannon to use the income for the support, not of herself, but of the particular child. We quote:

"We think that a reasonable construction of the trusts for the children is that their mother was required to use the income for the support and maintenance of the particular child, even though she was not required to account to anyone as to how she spent the money." (Resp. Br. 15)

In other words, the Tax Court says that the income is taxable to the decedent because he could have compelled its use to satisfy his obligation to support *Mrs. Mannon*, whereas the Commissioner now says in effect "No, that is not the proper basis for taxing the decedent—the basis should be that he is taxable because he could compel the income to be used to satisfy his obligation to support *the children*."

Such disagreements and inconsistencies are inevitable when the argument is based (as is the Tax Court's and the Commissioner's) upon implication and assumption and not upon the language of the instruments as written. Neither the Tax Court nor the Commissioner has been able to point to any provision in the trusts or in the property agreement that says that Mrs. Mannon shall use

the trust income for support, either of herself or of the children. They have to “*imply*” that, to get it at all, and they cannot agree even upon what the implication should be.

The Commissioner attempts to find a basis for his implication in the two provisions to which his brief refers—(first) the provision that the income, though given to the particular child, is to be paid to Mrs. Mannon (Resp. Br. 15), which is, of course, making the implication up out of whole cloth, and (second) the provision giving *the trustees* (not the decedent) the right to invade *corpus*, not income, if the immediate income beneficiary should need funds, over and above the trust income, to meet some emergency or to provide for maintenance, support and education (Resp. Br. 16). It is surprising that the Commissioner reverts to this argument that has long been held to be without merit.* It suffices to refer to

Suhr v. Commissioner (C.C.A. 6, 1942) 126 Fed.
(2d) 283,

where the husband set up a trust for his wife and her two children and provided that the trustee, in its sole

*It is to be noted that the Tax Court, although it intimated by way of dictum that it would hold the income of the children's trusts to be taxable to the decedent even if it were to be held that it belonged to the children rather than to Mrs. Mannon (R. 175), did not attempt to support this view by the argument now made by the Commissioner and long since repudiated in the *Suhr* case. The result was again arrived at by the process of implication—the statement being that the emphasis on support in the property agreement “leads to the conclusion that the income was to be used for the children's support and maintenance as included in her own” (R. 175), which is something of an achievement in “implying.”

discretion, should have the authority to invade corpus so far as the trustee should

“deem it necessary to properly care for and support her, taking into consideration such other means of support and sources of income she shall have”

and the Circuit Court of Appeals for the Sixth Circuit answered the very contention that is now made by saying:

“The decision in *Douglas v. Willcuts* is not applicable to sustain the present tax. There is nothing in the trust instrument to support an inference that the trust was in discharge of the grantor’s legal obligation to support his wife. There was no agreement by her that the benefits of the trust were to relieve him of such obligation, nor was any of the income of the trust used for maintenance or support. *The fact that the grantor, in the exercise of caution, envisioning perhaps the possibility of a change in his fortunes, lodged in his trustee a discretion to invade the corpus of the trust for this purpose, is not enough to warrant a holding that the trust was executed in discharge of the grantor’s common law, statutory, or moral obligation to support his wife.*”
(p. 285)

Similar provisions for the invasion of corpus at the discretion of the trustee were involved in the following cases, all of which held that, absent any provision that the trust income should be used for maintenance or support, the income was not taxable to the trustor.*

Ralph L. Gray (1938) 38 B.T.A. 584.

Robert P. Scherer (1944) 3 T.C. 776, 798.

*We might add that even if it were to be held that the income from the children’s trusts belonged to the children, though payable to Mrs. Mannon for their account, the rule in California

See, also,

Alex McCutchin (1945) 4 T.C. 1242, 1253, 1254.

Reply to Respondent's Contention That Decedent Could Require Trust Income to Be Used to Discharge His Obligation of Support.

The Commissioner next suggests that in any event, in view of paragraph 2 of the property agreement stating that Mrs. Mannon accepted the conveyance of the family residence, the provision for the payment to her of \$700 per month for support and maintenance and the establishment of the trusts as a satisfactory and reasonable provision for her maintenance and support, the decedent could, in his discretion, have compelled the use of the trust income for support and maintenance "simply by refraining from contributing his separate funds to the support of his wife and children" (Resp. Br. 18). Obviously, this is not true unless the decedent had *the legal right* to refuse to furnish support and maintenance. This same argument was made and answered in the *Suhr* case, where the court said:

" . . . it is argued that under the present agreement, if the grantor should not pay the family expenses, then the wife would be required to use the

would still be that, without a provision for its use for their support (and no such provision has been pointed to), Mrs. Mannon could not lawfully use it for that purpose so long as the decedent was able to support them (as it is stipulated he was, R. 46), In re Keck (1929) 100 Cal. App. 513, 514; In re Carboni (1941) 46 Cal. App. (2d) 605, 613, and in such a situation the income obviously is not taxable to the trustor. Lillian M. Newman (1943) 1 T.C. 921; Glenn S. Allen, Sr. (1944) T.C. Memo. Docket No. 2149, 3 C.C.H. T.C. Memo. Decisions, Decision No. 13,697 (M); *Helvering v. Hormel* (C.C.A. 8, 1940) 111 Fed. (2d) 1, affirmed on other grounds in 312 U.S. 552.

trust income for her support and maintenance. This overlooks the fact that the income becomes the sole property of the wife. There is no obligation upon her to support the family if her husband can, and he is not relieved of his legal obligation to do so. It is, of course, true that if he failed, the wife might use her own funds for that purpose, but that would be by her own volition and not through any obligation imposed upon her by the trust." (126 Fed. (2d) at 285)

If the argument of the Commissioner is intended to mean that the decedent did have the legal right to refuse to furnish support because of the property agreement, again the Commissioner is abandoning the decision of the Tax Court and, what is more, is ignoring the applicable California law. As the Tax Court pointed out, in California so long as husband and wife are living together (and it is stipulated that during the taxable years here involved Mr. and Mrs. Mannon were living together, R. 45) they may not, by contract, alter their legal relations except as to their property and the husband cannot limit, much less by contract terminate, his obligation of support. As the Tax Court said:

" . . . Although a husband and wife while living together in California may change the status of their property from community to separate property, California Civil Code (Deering) sections 158-160; *Siberell v. Siberell*, 214 Calif. 767, 770; *O'Bryan v. Commissioner*, 148 Fed. (2d) 456, they can not while living together validly provide that payment of any certain sum shall discharge the husband's obligation to support and maintain the wife. California Civil Code (Deering) section 159; *Brown v.*

Brown, 83 Calif. App. 74, 80-81; Boland v. Boland, 7 Calif. App. (2d) 401, 404. The wife is entitled to support in accordance with the husband's condition and station in life, Shebley v. Peters, 53 Calif. App. 288, and a contract specifying a certain sum for support is bad because it would not, as it should, change with the financial circumstances of the husband. See Garlock v. Garlock, 279 N.Y. 337." (R. 167)

It follows that the decedent did not have the legal right, as the Commissioner would imply, to refuse to meet his obligation of support and thus by indirection force Mrs. Mannon to use the trust income, which he had given to her unrestrictedly, for the purposes of support. Moreover, the whole course of action of the parties themselves under the agreements is inconsistent with the view that the decedent had any such right and utterly at odds with the thought that the decedent had discovered a way, by subterfuge, of reserving an unstated power and control over the trust income.

Obligations and Restrictions May Not Be Added by Implication

The whole difficulty in this case, as indicated above, arises out of the fact that both the Tax Court and the Commissioner seek to *imply* obligations that the written instruments do not contain. The instruments show unmistakably that when the parties meant to deal with maintenance and support they knew how to say so in language that was too clear to be misunderstood. When restriction was intended it was plainly stated. When no restriction or limitation was intended—as was, we sub-

mit, the case with the trust income—none was stated and it does not lie with the Commissioner or the Tax Court to impose by implication restrictions and obligations the parties themselves declined to state. It should not be necessary to support such elementary principles as these by citation of authority, but in view of the lengths to which the Tax Court and the Commissioner have gone in implying things that were not written, it may not be amiss to advert briefly to the statute and case law which must control the decision of this case.

Section 1638 of the California Civil Code provides:

*“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”**

In Section 1858 of the Code of Civil Procedure the applicable rule of construction is stated to be:

*“In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.”**

*The cases, both state and federal, agree: *Cummins v. Bank of America* (1941) 17 Cal. (2d) 846, 849 (*“Courts must construe agreements in their entirety and as written by the parties, without deletion or interpolation.”*). *Bader v. Coale* (1941) 48 Cal. App. (2d) 276, 279 (*“ . . . in interpreting language courts are never justified in searching for subtlety of expression. . . . the parties are presumed to mean, unless the contrary clearly appears, exactly what they say.”*). *Skidmore v. County of Tuolumne* (1939) 35 Cal. App. (2d) 525, 531 (*“ . . . the courts must take the contract of the parties as the parties have written it.”*). *Rabbitt v. Union Indemnity Co.* (1934) 140 Cal. App. 575, 585 (*“ . . . the office of the judge is*

If it should be thought that in this case the meaning of the instruments—clear as they are—is in doubt, the settled rule is that they should be construed in the light of the subsequent conduct of the parties under them,* which was entirely out of harmony with any thought that the decedent had the rights which the Tax Court and the Commissioner would imply he contracted for and obtained under paragraph 2 of the property agreement.

simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted or to omit what has been inserted.*"). *Loyalton Co. v. California Co.* (1913) 22 Cal. App. 75, 77 ("*Where parties have entered into written engagements which industriously express the obligations which each is to assume, the court should be reluctant to enlarge them by implication as to important matters. The presumption is that having expressed some they have expressed all of the conditions by which they intended to be bound.*"). *Sheets v. Seldon* (1868) 74 U.S. 416, 423 ("The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended."). *Douglass v. Douglass* (1874) 88 U.S. 98, 104 ("We cannot interpolate what the contract does not contain. *Our duty is to execute it as we find it, and not to make a new one.*"). *Wellsbach Eng. & Management Corp. v. Commissioner*, (C.C.A. 3, 1944) 140 Fed. (2d) 584, 587 ("*The court will not construe a contract in conflict with the plain and accepted meaning of the language used; or add words to a contract, the meaning of which is clear; or hold a covenantor beyond his undertaking.*"). *Henrietta Mills v. Commissioner* (C.C.A. 4, 1931) 52 Fed. (2d) 931, 934 ("*The courts will not write contracts for the parties to them nor construe them other than in accordance with the plain literal meaning of the language used.*"). *Adamson v. Alexander Milburn Co.* (C.C.A. 2, 1921) 275 Fed. 148, 153 ("*The courts cannot read into contracts words which the parties did not put there.*"). *Sherman v. Commissioner* (C.C.A. 9, 1935) 76 Fed. (2d) 810, 811 ("The intention of the parties to a written agreement must be determined from its terms."). To the same effect, *Jurs v. Commissioner* (C.C.A. 9, 1945) 147 Fed. (2d) 805, 810.

*There are many cases including: *Moore v. Wood* (1945) 26 Cal. (2d) 621, 629 ("The practical interpretation of a contract by the parties constitutes cogent evidence of intent . . ."). *Johnston v. Landucci* (1942) 21 Cal. (2d) 63, 71 ("The contemporaneous and practical construction of a contract by the parties is strong evidence as to the meaning of equivocal provisions."). *Preston v.*

With these elementary principles in mind, we come to their application to the case now before the Court. In our opening brief it was pointed out (pp. 11-12) that there is really no dispute over the rules of *tax* law that are involved. Those rules are simply that if the income of the trusts was Mrs. Mannon's without restriction, limitation or obligation, it was taxable to her, whereas if the decedent had the right, in *his* discretion, to compel the use of the trust income to discharge his obligation or support the income was taxable to him under the rule of

Douglas v. Willcuts (1935) 296 U.S. 1.

These propositions the Commissioner's brief does not controvert nor, in view of the controlling authorities, could they seriously be questioned.

We then undertook an analysis of the trust instruments, the property settlement agreement and the applicable authorities to determine whether, in point of law, the decedent in this case had the right, in his discretion, to control the use of the trust income and to require it to be devoted to the satisfaction of his legal obligation of support. We then had and we now have no difficulty in stating our position, which is based upon the instruments exactly as they are written. As

Herminghaus (1930) 211 Cal. 1, 11 (" . . . such ambiguity has been fully explained by the construction of the contract by the parties themselves . . ."). *Brooklyn Life Insurance Company of New York v. Dutcher* (1877) 95 U.S. 269, 273 ("*The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what the parties meant, than to see what they have done.*"). And see in this Court, *Holbrook v. Petrol Corp.* (C.C.A. 9, 1940) 111 Fed. (2d) 967, 969 and *Cutting v. Bryan* (C.C.A. 9, 1929) 30 Fed. (2d) 754, 756.

the property agreement makes clear, Mrs. Mannon and the decedent were dividing their properties between them and adjusting all of their property rights upon a broad basis. In this situation it was natural that they should provide for the support and maintenance of Mrs. Mannon and the children and that recognition should be given to Mrs. Mannon's interest in the community property. Accordingly the property agreement provided—and was very express about it—that the decedent would pay \$700 a month for the support and maintenance of Mrs. Mannon and the children. Instead of allotting to her a share of the community property, the community property was placed in trust, the income from a half of it (the amount included in Mrs. Mannon's trust) to go to her for life and the income from the other half of it (the amount included in the children's trusts) to go to her during the children's minority. The trust instruments themselves impose no obligation or restriction whatever upon the use of the trust income—much less do they contain any words giving the decedent any discretion or control over its use. The property agreement is likewise absolutely barren of any provision saying how the trust income should be used or giving the decedent any authority over it, though it does state that the entire provision for Mrs. Mannon—the conveyance of the family home, the obligation of the decedent to pay \$700 a month for support and maintenance and the establishment of four trusts—was accepted as satisfactory,

reasonable and sufficient provision for Mrs. Mannon's support and maintenance. The Tax Court and the Commissioner would imply from this provision a limitation and restriction upon the use of the trust income and a right in the decedent to control its use that is not to be found in the trust instruments or property agreement. Not only is there no such provision in paragraph 2 of the property agreement, but on this issue we cited authorities where similar and in some instances much stronger language in favor of the Commissioner was held not to give rise to any such limitations or right of control as claimed by the Commissioner. These authorities were manifestly in line with the cases previously referred to holding:

“Where parties have entered into written engagements which industriously express the obligations which each is to assume, the court should be reluctant to enlarge upon them by implication as to important matters. The presumption is that having expressed some they expressed all of the conditions by which they intended to be bound.”

This is particularly so in view of the express provision of the property agreement that

“This agreement contains the entire understanding of the parties. There are no representations, warranties, promises, covenants, or understandings other than those expressly set forth herein.” (R. 56)

Since no limitation upon Mrs. Mannon's use of the trust income was stated and since no provision is to be found giving the decedent discretion or control over the use of the income, it followed that the trust income was not taxable to the decedent.

With all deference, we are constrained to say that the opposing brief makes no serious effort to reply. It is not

said that the cases which we cited do not hold what we said they hold. Only the *Bok* case is mentioned by name and the Commissioner seems satisfied with the attempt of the Tax Court to distinguish that case, although we pointed out in our opening brief (pp. 24-26) that the courts which decided the *Bok* case *expressly* rejected the Tax Court's attempted ground of distinction and placed their decision squarely upon the point stressed by us.

The decisions of the Tax Court which we cited are attempted to be passed off with the statement that the Tax Court distinguished them and, if not distinguishable, our case is the Tax Court's latest decision on the subject. (Resp. Br. 20) In view of the fact that the Tax Court did not intimate that it was overruling or qualifying its earlier decisions, the Commissioner's second ground for disposing of those cases cannot stand. As to the suggestion that they are distinguishable, we believe that this Court will find them helpful analogies on the issue as to the proper construction of the Mannon instruments.

Nor does the Commissioner cite authority to the effect that instruments, such as we have here, are to be construed as giving the trustor the right, in his discretion, to have the trust income used to meet his obligation of support. Indeed, the Commissioner cites only three cases on this phase of the argument and even a cursory reading would make clear that they cannot help the Commissioner's cause. In the first case,

Mather v. Commissioner (1945) 5 T.C. 1001, affirmed *per curiam* 157 Fed. (2d) 680, (C.C.A. 6, 1946) certiorari denied .. U.S. .., 67 S.Ct. 676, 91 L.Ed. (Adv. Ops.) 553,

each of the trusts contained a provision, identical except as to the name of the beneficiary, that

“The Donor retains the right to elect at any time to have all or any part of the net income used for the maintenance and education of his said son, Rathbun Fuller Mather, or said son’s lineal heirs.”

Obviously, such a provision gives the trustor the *express* right, in his discretion, to require the trust income to be used for maintenance purposes. Both the Commissioner and the Tax Court have looked long and in vain for any similar provision in the instruments now before the Court.

The next case cited by respondent is

Ingraham v. Commissioner (C.C.A. 9, 1941) 119
Fed. (2d) 223, .

which was decided by this Court. In that case the trust instrument itself provided:

“If at any time during the existence of said trust I, the said Harold Ingraham, shall be lawfully compelled to pay any sum or sums for the support of said Olive Judd Ingraham or of our said children, then the said United States Security Trust Company shall repay to me, the said Harold Ingraham, any sum or sums which I may be thus compelled to pay out of the income of said trust estate.”

Here, again, we have an *express* provision in the trust instrument itself that the trustee shall repay to the trustor out of the trust income any amount that the trustor may lawfully be compelled to pay for support. Plainly enough if, as in *Ingraham*, the trust expressly provides that the trustor shall be reimbursed out of the trust income to the

extent that he is required to meet his obligation of support, the trust income is dedicated to satisfy his legal obligation and is therefore taxable to him. There is no similar provision in the instruments now before this Court and the whole opinion in the *Ingraham* case makes it clear that, absent such a provision, the result would have been that the trustor was not taxable.

Nor is there any equivalent provision in the instruments here. We have already answered at pages 7 and 8, *supra*, the Commissioner's contention that under the property agreement the decedent could, as a practical matter, have controlled the use of the trust income by simply refusing to contribute to the support of his wife and children by showing that the property agreement did not, and as a matter of California law could not, give him any such control. Our case is, therefore, within neither the facts nor the principle of the *Ingraham* case.

The last case cited by respondent is

Corliss v. Bowers (1930) 281 U.S. 376,

which, of course, is not even remotely in point. As respondent must know, in that case the trustor was taxed, not because the trust income was dedicated to the discharge of his obligation of support, but because the trust was revocable by him and accordingly he could have had the income for the asking. It is not contended that the Mannon trusts are revocable and if the Commissioner means to suggest that, as was the case in *Corliss v. Bowers*, the trust income here was subject to the trustor's (here, the decedent's) "unfettered command" the answer is, simply that that is not so in this case.

The issue before the Court should not be difficult of determination. The controlling question is whether the decedent had the right, in his discretion, to require the trust income to be used in discharge of his legal obligation of support. This is determinable by a reading of the written instruments. The writings themselves are simple enough and the rights and obligations of the parties are clearly expressed. They say that the trust income is Mrs. Mannon's and they do not say that she is to take it subject to any restriction, limitation or obligation nor do they say that the decedent is to have any discretion as to its use. Such provisions, if there are to be any such, can only be supplied by implication and assumption. They are not now there nor has the Commissioner or the Tax Court been able to point to them, though they have suggested that they should be implied. Both statute and case law forbid that they be added in this manner.

Conclusion

It is submitted that under the trusts and property agreement the trust income is given to Mrs. Mannon without any restriction or limitation and without any control over its use, discretionary or otherwise, on the part of the decedent. The Tax Court's determination that the decedent had it within his power to require the trust income to be used in discharge of his legal obligation is not supported by, but is contrary to, the plain language of the instruments. The decision below should

be reversed and the cause remanded with instructions that none of the trust income is taxable to the decedent.

Respectfully submitted,

A. CRAWFORD GREENE

HENRY D. COSTIGAN

ROBERT L. LIPMAN

STANLEY MORRISON

JOHN WICKSON THOMAS

Attorneys for Petitioners

Dated: May 15, 1947.

